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REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR

THE RICHMOND DISTRICT.

VOLUME IV.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

NEW-YORK:

Printed and published by Isaac Riley.

1811.

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DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the eleventh day of February, in the thirty-fifth year of the Independence of the United States of America, ISAAC RILEY, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words and figures following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of Chancery for the Richmond District. Volume IV. by William W. Hening and William Munford."

IN CONFORMITY to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An act, supplementary to an act, entitled, an act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints."

CHARLES CLINTON,
Clerk of the District of New-York.

ERRATA.

Page 152, line 5th, for "*Elizabeth*" read "*Anne.*"

Page 155, at the end of the case of *Braxton* v. *Gaines & others*, add,

"*Wednesday, October* 11th. BY THE COURT, consisting of Judges "FLEMING and TUCKER, the decree was reversed, and the bill dismissed, "as to the appellant *Anne Corbin Braxton*, who was ordered to be quieted "in the possession of *Thamar* and her increase."

Page 172, at the end of the case of *Eppes's Ex'rs* v. *Cole & Wife*, add,

"Judge FLEMING said it was the unanimous opinion of the Court that "the judgment be affirmed."

Page 282, *in the note*, the reporters were mistaken in supposing that Judge ROANE was *related* to the plaintiff. Other motives prevented his sitting in the cause.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

At the Term commencing in April, 1809.

IN THE THIRTY-THIRD YEAR OF THE COMMONWEALTH.

(*Continued.*)

JUDGES, PETER LYONS,(1) ESQUIRE, *President.*
WILLIAM FLEMING, ESQUIRE.
SPENCER ROANE, ESQUIRE.
ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,

PHILIP NORBORNE NICHOLAS, ESQUIRE.

Coleman, Executor and Trustee of Rowlett, *against* Moody.

Wednesday, May 3d.

FRANCIS MOODY applied to the County Court of *Mecklenburgh* for leave to erect a water grist-mill on *Butcher's* creek, being proprietor of the land on both sides of the stream at the place proposed for the abutment. He gave a written notice, of his intention to move for a writ of *ad quod damnum*, to *Thomas Coleman*, "acting trustee and "executor of *Thomas Rowlett*, deceased," stating that he

1: The *reasonable* notice which the law requires upon taking depositions must depend upon circumstances; therefore, where a notice was left with the wife of the party at his dwelling-house, when it was known by the adverse party

(1) Judge LYONS was absent the whole of this term *as well as the last*, having been prevented from attending by indisposition.

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the said *Coleman* had lands above the said place, on the said stream, *vested* in him in trust for certain purposes designated by the last will and testament of his testator, and that the object of the intended application was to ascertain what damages might be occasioned to him as acting trustee aforesaid, or to other persons, by erecting a dam of the height of 15 feet 2 inches. In the petition and order for the writ of *ad quod damnum*, as stated in the record, nothing was said of the height of the dam; but the writ issued by the clerk directed the inquiry of damages to be made, upon the supposition that the height of the dam was to be as above mentioned. A notice was also given to *Coleman* of the time and place of meeting of the Jury, who found that, by a dam 15 feet and two inches high, no mansion-house, offices, curtilage or orchard would be overflowed; that the passage of fish and ordinary navigation would not be obstructed; and that, in their opinion, the health of the neighbours would not be annoyed by the stagnation of the waters; that three acres of land belong-

that he was absent on a journey to another state, and where it appeared also, that the notice *might* previously have been given to the party himself, and that the taking of the deposition *might* have been postponed, as it respected the trial of the cause, till his return; it was held that the notice was insufficient, and the deposition taken under it was suppressed.

2. An inquisition on a writ of *ad quod damnum* in a mill case, having found that lands of *T. R. deceased*, would be overflowed, and a summons having issued to *T. C. acting executor* and *trustee* of the decedent, to shew cause why leave should not be given to erect the mill; and *T. C.* having appeared and contested the motion *on its merits*, he was precluded from afterwards saying that he was not legally summoned as the *tenant* or *proprietor* of the land.

3. The mentioning in the writ of *ad quod damnum* a certain height for the mill-dam, is no ground for setting aside the proceedings at the instance of the opposing party; notwithstanding no particular height was specified in the order directing the writ.

4. If the Jury find that a certain number of acres of land will be overflowed, "*together* "*with all other damages* to the value of a specified sum," it is special enough, and will not bar an action for any damages not foreseen and estimated by them.

5. An order of Court granting leave to erect a mill is valid, though no order be made directing payment of the damages found by the inquisition.

6. An inquisition in a mill case ought not to be set aside on the ground that the jurors, before they were sworn, and afterwards, when their verdict had been agreed upon, but before they had signed it, ate and drank moderately at the expense of the appellant, no corruption appearing, and the opposite party having consented.

7. It is sufficient for the clerk to state in the record, that the writ of *ad quod damnum* with the inquisition annexed, was returned by the *sheriff*, without inserting a copy of the signature of the sheriff, or of his deputy, to the return; a copy of the inquisition itself with the signatures of the jurors being inserted in the record.

ing to the *estate of Thomas Rowlett, deceased*, would be overflowed, together with *all other damages* to the value of fifty dollars; and that the estate of no other person would sustain any damage. Their inquisition so made was first signed and sealed by *John G. Baptist*, (the deputy-sheriff who attended them,) in this manner, "Witness "*John G. Baptist*, (seal,)" and then by the twelve jurors, and together with the writ was returned by the sheriff to the succeeding Court; but the signature of the high sheriff or his deputy to the return on the writ was not inserted in the record; neither was his title of deputy-sheriff added to the signature of *John G. Baptist*. On the return of the inquest, the Court ordered a summons to be issued to *Thomas Coleman*, "sole acting *executor and trustee* of *Tho-* "*mas Rowlett*, deceased," to shew cause if any he could, why leave should not be granted to *Francis Moody* to build his mill agreeable to the inquisition and Jury's report thereupon. This summons was returned, executed by *John G. Baptist*, deputy of *William G. Baptist*, sheriff. *Thomas Coleman* accordingly appeared, and endeavoured to shew cause; but, after hearing the parties by their attorneys, and the evidence on both sides, the Court granted *Moody* leave to erect the mill and dam, to the height of 15 feet and two inches. No order was made directing the payment of the fifty dollars to *Coleman*, but the record stated that *Moody* produced the money at the clerk's table, and called on *Coleman's* attorney to receive it, who refused; and no person entitled thereto appearing to receive it, it was ordered that the clerk should receive and keep it for the benefit of "the proprietors or persons damaged agreea- "ble to the inquest."

On an appeal to the District Court of *Brunswick*, the order of the County Court was affirmed; whereupon *Coleman* again appealed to the Court of Appeals.

A number of witnesses were examined before this Court, whose testimony (under the rule now established) was committed to writing; but to mention even its substance,

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in our report of the case, would be tedious and useless. Suffice it to say that the weight of evidence was in favour of establishing the mill, as greatly conducive to the convenience of the neighbourhood; and the witnesses generally were of opinion, that the *quantum* of damages had been rather overrated by the Jury, for the purpose of satisfying *Coleman*, and putting an end to further controversy. One circumstance, however, must be noted. It appeared in evidence that the Jury met at *Moody's* house; that the weather being very warm, and some of them having travelled a considerable distance, he set out some spirits, took a drink himself, and said he was disagreeably situated because he could not offer them any; that *Coleman*, who was present, said he had no objection to their taking some refreshment, and so saying, set the example himself; that thereupon most of the Jury took a little spirits and water; that when they had finished viewing the mill-seat and grounds on the creek, they returned to the house, at a late hour in the evening, after having agreed on their report; and while the deputy-sheriff and surveyor who attended them were writing the inquisition, they again drank moderately and ate at *Moody's* expense; that *Coleman* made no objection to their doing so, partook of the same refreshments, and stayed with them until they had all signed the inquisition; that some of the jurors might, perhaps, have *felt* what they drank, but none of them appeared intoxicated; that one of them made a slight objection to part of the inquisition, before it was finished, but afterwards waived the objection, and approved of it as written.

On the part of the appellee, for the purpose of proving that *Coleman*, as *proprietor* or *tenant* of the land, was the person who ought to have been summoned, the will of *Thomas Rowlett*, dated the 29th of *December*, 1805, and recorded the 13th of *January*, 1806, was introduced and read; (though not inserted in the record of the proceedings in this cause in either of the Courts below;) but the Judges gave no opinion relative to its admissibility as evidence. From that document it appeared, that after certain

specific and pecuniary legacies, the testator directed all the residue of his estate, both real and personal, to be kept together for *two* years after his death, and then to be sold by his executors, and "after paying his debts, if any "should be due, and the legacies aforesaid, that the whole "of his estate *arising from the said sales, and the profits* "*of his estate until the said sales*, be divided into three "equal parts," &c. *Thomas Coleman* alone qualified as executor. The summons was issued *August* 12th, and served *September* 14th, 1807; and the County Court acted finally on the subject in *December* following, before the two years in which the estate was directed to be kept together had expired. Parol evidence was also introduced (without any decision as to its being admissible) to shew that *Coleman* exercised acts of ownership, or such as evinced possession of the land, during those two years, by employing overseers and receiving the profits; in the course of which investigation it appeared, that shortly after the decision in the County Court, he sold the land at public sale, in obedience to the directions of the will, and became himself the purchaser.

[Among other evidence the appellant offered to read the deposition of *William W. Green*, taken by virtue of a commission issued from this Court on an affidavit filed, that the witness was, through infirmity, unable to attend. It appeared that *Coleman* had himself accompanied the person employed to give notice of the time and place, to the house of *Moody*, whose wife informed them that he was then in *North-Carolina*, and would not return until a day or two after that appointed for taking the deposition; that on their way, they had been told by others, that *Moody* was gone to *North-Carolina*; that nevertheless, the notice was given to Mrs. *Moody* on a *Saturday*, and the deposition taken on the *Wednesday* following, being the 22d day of *March*; that *Moody* returned home a day or two afterwards; that *Coleman*, meeting with him at a public house, where the witness and two magistrates happened to be present, told him he might ask the witness any questions

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he thought proper, before those magistrates, and the answers given might be read as evidence in the cause; but did not shew him the deposition, without seeing which, it was contended on his part, he could not have known what questions to ask; that indeed, the paper itself had, previously to this occurrence, been delivered to the Clerk of the Court of Appeals. It was also proved that *Moody* was at *Mecklenburgh* Court (on his way to *North-Carolina*) the *Thursday* before that on which the deposition was taken, and that *Coleman* was there also. *George K. Taylor*, counsel for the appellant, endeavoured to excuse his precipitation in taking this deposition before *Moody's* return, by stating that *Coleman* at that time expected the cause to be tried before the end of the *March* term, and therefore thought it necessary to be expeditious in preparing for trial; though during that term, by consent of the counsel on both sides, but without his knowledge until after the deposition was taken, the 2d of *May* was appointed for the hearing. Mr. *Taylor* also solicited the Court (should they be of opinion that the notice was insufficient) to renew the commission, and grant a farther day in the term. But the Court unanimously declared the notice not to have been reasonable, and rejecting the deposition, moreover refused to delay the hearing.]

George K. Taylor, for the appellant, (besides contending that, on the *merits*, leave ought not to be granted to raise the dam to the height of 15 feet 2 inches,) made the following objections to the proceedings in the County Court.

1. According to the 3d section of the act concerning mills,(*a*) the summons must be issued to the *proprietors* or *tenants* of the lands found liable to damage. It should have appeared, therefore, upon the record, that *Thomas Coleman* was *tenant* or *proprietor;* but here there is nothing to shew this. He is only styled *executor* and *trustee*, from neither of which characters can it be implied that

(*a*) *Rev. Code*, vol. 1. p. 198.

he was entitled to, or in possession of the land. The case of *Tanner's* Administrator v. *Sadler*(*a*) fortifies this objection; for there, though it was decided that an administrator, being in possession of the land of his intestate for special purposes, could maintain a *caveat*, yet the fact of his possession was expressly found in the special verdict, and nothing was left to presumption, or extrinsic evidence.

(*a*) 2 *Hen. & Munf.* p. 370.

2. The original motion was merely for a writ of *ad quod damnum*, in general terms, and the order of Court was made accordingly. By what authority then did the clerk mention in the writ, 15 feet 2 inches? By so doing, he precluded the Jury from stating the advantage or disadvantage of making the height less or more than that specified in the writ.

3. The Jury find "*all other* damages," to the value of fifty dollars; not the injury to the land alone. The 7th section of the act of Assembly(*b*) provides, that an action shall not be barred for damages not foreseen by the Jury; yet this comprehensive and indefinite finding of "all other "damages," would bar any future action. The verdict should have specially and distinctly stated each injury, and its value.

(*b*) *Rev. Code*, vol. 1. p. 198.

4. After the Court had granted leave to erect the mill, *Moody* produced fifty dollars, and no person appeared to receive it. The inference is strong that *Coleman* was not the person in possession. Besides, no *order* was made that the money should be paid to him.

5. The Jury drank at the expense of *Moody*, the party in whose favour their verdict was given; which is a fatal error, according to Lord *Coke*;(*c*) though, in such case, if the verdict be *against* that party, it shall not be set aside.

(*c*) 1 *Inst* 157. b.

Munford, for the appellee, observed, that *Moody* being owner of the land on both sides of the stream, was not obliged to give notice of his intended application for the writ of *ad quod damnum*, or of the time and place of meeting of the Jury, to *Coleman* or any body else. Such notices are required by law, only where the person applying, owns the land on *one side* of a water course, and that

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on the opposite side, against which he would abut his dam, is owned by another person, to whom such notices must be given.(a) It is true, then, that in this case the notices were works of supererogation; yet the first of them served to apprize the appellant of the ground on which he was made a party.

(a) *Rev. Code*, vol. 1. p. 197. c. 105. s. 1, 2.

It ought to be *presumed* from this record, that *Coleman* was either entitled to the legal estate, or in possession of the land, as he is repeatedly styled, and admitted to be, sole acting executor and *trustee* of the last will and testament of *Rowlett*, whose lands alone are found liable to damage. The notice first given informed him that the land was considered as *vested* in him for the purposes designated by the will; the summons also must have been understood by him in the same manner; yet he no where denies his title to, or possession of the land, neither does the point appear to have been made by a bill of exceptions, or in any other way. This objection is evidently an afterthought, suggested by the fertile genius of his counsel in this Court, but which never entered into the mind of *Coleman* himself. If he was neither proprietor nor tenant of the land, he was not interested in the controversy, and therefore, ought not to have meddled with it. Yet we find him in every stage of the proceedings, appearing by his attorney, or in person, and opposing every step taken by *Moody*; but never on the ground that he was not himself interested in the point in dispute. If, indeed, that had been the case, he would have had no right to appeal from the order, according to the decision of this Court in the case of *Sayer* v. *Grymes*.(b)

(b) 1 *Hen. & Munf.* p. 403.

But, if the question be doubtful from the record, we have proved his *possession* by the copy of the will, and by parol evidence, which, in cases of this sort is always admitted.

According to the will, even if the *legal estate* was not in *Coleman*, not being expressly devised to the executors, the *possession* was; for he was the only person who had a right to hold the land, and keep it together until the end of the

two years; there being no devise of the *land* to any other person. He was to receive the *profits*, and be accountable for them, towards the payment of debts and legacies, and finally to sell the land and divide the *money* among the distributees. He was therefore certainly as much to be considered in possession, as an executor or administrator of a person dying after the first day of *March*.(a)

(a) *Rev. Code*, vol. 1. p. 166. c. 92. s. 46.

As to the second point, the clerk's mentioning in the writ the height to which *Moody* wished to raise his dam, certainly could not have the effect of limiting the Jury in their inquiries. Their being directed to inquire what damages would result from a height of 15 feet 2 inches, did not preclude them from examining the subject in other aspects also, and stating if they thought proper, the comparative advantages and disadvantages of that and other degrees of elevation. But, in fact, the clerk acted correctly in mentioning the height of the dam; because, in so doing, he submitted to the Jury the true point in dispute, as was evident from the notice, according to which, no doubt, the motion was made; though in his concise manner of entering the order of Court in the minute-book, he did not express that circumstance in the order. The same thing is proved by all the subsequent proceedings, and by the conduct of *Colcman* himself, who should have moved to quash the writ of *ad quod damnum*, if it had issued incorrectly; but never made such a motion, and ought not to be permitted to make it now at this late stage of the controversy.

The third objection is a strange one indeed! It amounts to this, that the power of the Jury is superior to that of a positive law; that their finding that *all the damages* (which can only signify all the damages *estimated by them*) amounted to fifty dollars, could prevent the proprietor of the land from recovering, in an action, for other damages not foreseen nor estimated by them; notwithstanding the act of Assembly declares that such action shall be maintainable. The law does not direct the Jury to state separately, (like items in an account,) damages for every inconvenience which may arise from erecting the dam; but

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a general finding of the aggregate amount of damages, is always considered as sufficient: neither was it necessary in this case, to mention the value of the three acres of land which would be overflowed; as it is to value the acre laid off for the abutment of a dam.

The fourth point is not more tenable than the last. That no person appeared to receive the fifty dollars, is easily explained by the spirit of opposition manifested by *Coleman* throughout; a spirit which would not permit him to receive the money, for fear of giving some countenance to the motion of his adversary, and which has carried this apparently unimportant dispute (to the great expense and vexation of both parties) through the County and District Courts up to the Court of Appeals.

As to the circumstance that the Jury took a little spirit and water at the house of the appellee, before they were sworn, and after returning from their very fatiguing service, (which, in both instances, was done with the assent and co-operation of the appellant,) the objection is too captious and trifling to be countenanced in these enlightened times, especially when it appears in evidence that the Jury was highly respectable, and far above being influenced by such a pitiful consideration. Neither is it by any means clear that the verdict was *in favour of Moody*, the party who treated them with this slight refreshment; for it is proved that the damages they allowed to *Coleman*, were more than the value of any injury the estate he represented could sustain.

Upon the merits, the evidence clearly supports the motion, and authorises the order upon every ground of private benefit and public expediency. But if this were doubtful, the concurrent decisions of the District and County Courts, ought to be sanctioned here, as was done in the case of *Home* v. *Richards*.(a) In *Noel* v. *Sale*,(b) also, the decision was presumed to have been right "for "reasons appearing to the Court" below, notwithstanding those reasons were not specified in the record.

(a) 2 *Call*, 507.

(b) 1 *Call*, 495.

Wickham, on the same side, said there was no difficulty on the subject of the summons, because a trustee for the payment of debts or legacies is always considered as in possession of the legal estate.

Nothing in the law requires the Court to make any order about the money. The entry of *Moody's* offer to pay the fifty dollars, was the act of the clerk, and altogether unnecessary. The maxim therefore applies that "*utile per* "*inutile non vitiatur.*"

It was also unnecessary to mention in the writ of *ad quod damnum*, the proposed height of the dam; but its insertion cannot vitiate. Mentioning fifteen feet 2 inches, bound only and limited *Moody*, but could not benefit him. It takes latitude from him and promotes certainty. No human being is injured by it but the appellee. The appellant, therefore, if it was an error, cannot avail himself of it.

The finding of the Jury in this case is rather more special than usual. Their mentioning the three acres was unnecessary, and as to the damages, all the verdicts I have ever seen were *general.* The record cannot be a bar to an action for any damages not foreseen and estimated by the Jury, because the act of Assembly says that it shall not be a bar.

The attempt to overthrow the order of Court on the ground of misbehaviour in the Jury, is now too late, for if any such existed, a motion should have been made in the County Court to quash the inquisition.

Taylor. *On this point*, this Court has *original* jurisdiction, as it has *appellate* on the other points in the cause.

Wickham. The objection then should have been made by *motion*, before the hearing on the merits.

But, in fact, there was no misbehavionr in the Jury. Lord *Coke* in his commentary on *Littleton*, lays down many rules which are no longer in force, and some which the

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liberality of modern practice, has modified and relaxed from their ancient strictness. I understand the rule of law to be at present, that when a Jury are sent from the *bar*, they must not drink; but that rule does not apply to inquests in the country. I think, indeed, if that venerable Judge were now alive, he would not be so hard-hearted, as to object to the moderate and necessary refreshment taken by the Jury in this case.

Hay, in reply, besides commenting on the evidence, observed, (on the points of law,) "in this case an attempt is "made to deprive my client of part of his freehold; the "right to do so is founded not on the common law, but the "act of Assembly. The proceedings ought therefore to be "strictly conformable to the act. My client owns the "land *at present* by purchase under the will; but *the re-* "*cord* ought to shew that he was tenant or proprietor *when* "*he was summoned.*

"It is contended that the Court shall be presumed to "have done right, until the contrary appears. But here "the contrary does appear. The act requires the *tenant* "*or proprietor* to be summoned, but *Coleman* was sum- "moned *only as executor and trustee.* Suppose a notice "was given to the person entitled in *remainder*, either "vested or contingent, would it be sufficient? And where "is the substantial difference between such a notice and "this? That the proof of every thing essential to the ap- "plicant's obtaining leave to erect the mill, ought to appear "in the record itself, and not by testimony *aliunde*, is evi- "dent from the cases of *Richards* v. *Home*, 2 *Wash.* 36. "and *Martin* v. *Beverley*, MS. in 1805. In those cases "the several applicants for mills, being owners of the lands "on one side only, it was decided to be necessary to state "*on the record*, that the bed of the water-course belonged "to the applicant or to the commonwealth, and all other "evidence as to that point was rejected."

[Here Judge *Tucker* asked Mr. *Hay*, if the *actual tenant* had, in reality, no notice, whether he might not yet sue for

damages, or abate the nuisance? Mr. *Hay* answered that, according to Mr. *Munford's* doctrine, that the County Court must be presumed to have done right, the tenant could neither sue nor abate the nuisance; and he doubted himself whether he could with safety abate the nuisance until the proceedings were reversed, though he might have his action on the case.]

2. Does the *law authorise* the clerk to insert the height of the dam in the writ of *ad quod damnum*? The party might have been content with a dam not so high, yet the clerk confined the Jury in their inquiries, to a dam of that precise height.

3. The point as to the money has been misunderstood by Mr. *Wickham*. The County Court shewed by that entry, that they did not consider *Coleman* as the *tenant or proprietor*, and indeed were not informed what person held the land in either character, otherwise they would have directed the money to be paid to such person.

4. The Jury certainly contemplated other damages than those resulting from the lands being overflowed. If an action should be brought for any damage not foreseen or estimated by them, it may be said, upon the words of this inquest, that the Jury estimated that damage, the words being broad enough to cover *all possible* damages. The *onus probandi* ought not to lie upon any body; the whole of the damages estimated, and *for what*, ought to appear in the inquest.

It is said that the principle upon which a verdict is set aside for the Jurors' drinking, does not apply here; but this is a mere *dictum*. One fact appears in evidence, that a change in the inquest after it was first written was proposed; but objections gradually lost their force as liquor began to operate; and no change was made.

Another fact in the record is worthy of observation. It does not appear that the writ of *ad quod damnum* was executed by a sheriff or his deputy: no name of any sort is subscribed to the return, and the clerk's declaration, that the inquisition was returned by the sheriff, does not obviate the difficulty.

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The law concerning sheriffs,(*a*) requires the under-sheriff to subscribe the name of his principal, as well as his own, to all official returns made by him; but here he appears to have subscribed only in the capacity of *witness* to the signatures of the Jurors. The force of this objection is not impaired by the third section of the act concerning mills, requiring the inquest to be made and sealed by the *Jurors* only. I admit there is no necessity for the sheriff to sign it, but he ought to return it according to law; and the return being defective, ought to be quashed. The doctrine is explicitly stated in *Bac. Abr.* tit. SHERIFF, let. H. that the *deputy*-sheriff must always act in the name of the sheriff. It is only by virtue of our act of Assembly, that he is authorised to use his own name; and this act being in alteration of the common law, must be strictly followed by the deputy, or his returns are illegal.

(*a*) *Rev. Code*, vol. 1. p. 123. c. 80. s. 26.

In answer to the new point made by *Hay*, *Munford* contended, that it did sufficiently appear that the writ of *ad quod damnum* was executed by a deputy-sheriff. In another part of the record *John G. Baptist* is mentioned as deputy of *William G. Baptist*, sheriff; and the name of *John G. Baptist* is subscribed to the inquest. He has also been examined as a witness before this court, and has stated on oath that he was the deputy-sheriff who attended the Jury. True it is, in his signature he did not style himself deputy-sheriff, nor annex the name of his principal: but, if this was a neglect of duty, the only consequence is, that he is liable to a *penalty*, not that the inquest ought thereupon to be quashed.(*b*) But this subject may be viewed in another light: the record expressly states, that the inquest was returned *by the sheriff* to the Court; and Mr. *Hay* has no right to contradict the record. The clerk has only omitted to copy the *signature* to the return, which doubtless was indorsed on the writ of *ad quod damnum*; probably thinking it sufficient to certify the fact that such return was made, without copying the signature into the

(*b*) *Rev. Code*, vol. 1. p. 123. c. 80. s. 26.

record. Neither was it necessary to insert it, unless a question had been made concerning it. If in fact the writ was irregularly executed or returned, a motion to quash the inquest should have been made, and, if overruled, the point should have been reserved by a bill of exceptions.

But, if this objection, that the sheriff's return, as written by himself, ought to appear in the record, should be thought material, its utmost effect would be to induce the Court to award a writ of *certiorari* to supply the omission.

Wickham observed, it was the general practice of clerks in making out records, not to insert the return itself, with the signature of the sheriff, but merely to express it in general terms.

Hay. Mr. *Wickham* is unquestionably mistaken as to the practice. The signature of the sheriff to his return on the writ is always certified by the clerk where the judgment is by default.

Wickham. Even admitting Mr. *Hay* to be right in this position, the order in this case does not resemble a judgment by *default:* for *Coleman* was heard by his counsel, and, after an argument on the *merits*, the decision was against him.

Friday, May 26.

Judge TUCKER. The first exception taken to the proceedings in the County Court is, that the summons to shew cause against erecting the mill was directed *to Thomas Coleman, executor* and *trustee* of *Thomas Rowlett*, deceased; whereas the law requires the summons to be issued to the proprietor or tenant of the lands located, or found liable to damage. There are two answers to this objection.

The first is, that the *original notice* of the intended application for leave to build a mill, is directed to *Coleman* as *acting* trustee and executor, &c. and recites, that " he

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"hath lands above the said place on the said stream, *vested* "*in him* in trust *for certain purposes*," &c. The second is, that *Coleman* appeared, in consequence of the summons, and contested the petitioner's right, on the ground of inconvenience and injury to himself; thereby admitting himself to be the proprietor or tenant. And, having taken no exception to the summons on the ground now taken, he cannot do it in this Court; this case coming within the reason of the rule at common law, that appearance, and pleading to the action cures all defects in the process.

The second objection is, that the clerk had in the writ of *ad quod damnum* taken upon himself to state the precise height, to which it was proposed to raise the mill-dam. This, however, was pursuant to the *original notice*, and was perfectly right. The Jury were not to inquire to what height it was necessary, for the petitioner's purposes, to raise the dam, but what injury would ensue to *others*, if he were permitted to raise his dam so high.

The third objection is, that the Jury have said that a dam of the proposed height will in their opinion "over-"flow three acres of land belonging to the estate of *Tho-*"*mas Rowlett*, deceased, *together with all other damages*, "to the value of fifty dollars," &c. And that this finding will operate as a bar to a recovery against him for *any other* damages hereafter. This must depend upon circumstances. For the law declares that neither the inquest of the Jury, nor the opinion of the Court shall bar any prosecution or action, which any person would have had in law, other than such injuries as *were actually foreseen and estimated* by the Jury. Suppose it should happen that six acres of land, instead of three acres, should be overwhelmed: or that any house, office, garden, or orchard on the premises, should, in fact, be injured or overwhelmed thereby. Would this return upon the inquisition bar an action in such cause?

The fourth objection is, that several of the Jury, perhaps the whole, drank ardent spirits at the house of the pe-

titioner, before they proceeded upon the inquisition, and again before the same was completed and signed by them.

The purity of the trial by Jury, and more especially the incorruptibility of jurors, are subjects of supreme importance, in a country whose constitution declares, that that mode of trial *ought to be held* SACRED. And I am of opinion, that the same jealous vigilance ought to be exercised in cases of inquests of office, as in trials at common law. The reason is even stronger. The latter are had under the eye of a Court of Justice, which, if it observes any thing improper in the conduct of a Jury, will immediately set aside the verdict. Inquests of office are taken *in pais;* the superintendance of the sheriff may not always be adequate to the prevention or discovery of improper practices. No kind of bribe, or other evil practice, so soon finds its way to the head, as intoxicating liquors. Our act concerning roads (ed. 1794, c. 19.) prohibits a juror, *on pain of being* DISCHARGED *from the inquest, and immediately* IMPRISONED by the sheriff, from taking any thing of meat or drink *from any person whatsoever*, from the time they come to the place until their inquest be sealed. The act for removal of the seat of government to this place contains a similar provision, (*May*, 1779, c. 21.) and both appear to me to have been dictated in the true spirit of the common law, and of consummate wisdom and foresight. The omission of a similar provision in the act concerning mills, probably proceeded from the opinion of the legislature, that a repetition of such a provision in every act authorising an inquest, was, upon the principles of the common law, unnecessary, as being implied in all cases of the kind. In the present case, the fact is not denied; on the other hand, Mr. *Coleman* was present, and is not only said to have consented that the jurors, who were assembled at a late hour of the day in the month of *July*, should partake of the slight refreshment set before them, (a quart decanter of spirits brought out to a company of twenty or five and twenty persons assembled at the petitioner's house,) but set them an example, by taking a glass

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of spirits and water himself, before they set out to view the lands. No other impropriety of conduct seems to be chargeable to the Jury, until they had *agreed on their report.* They ate and drank at the petitioner's house, either before or immediately after the inquisition was *signed*, which was some time after night, Mr. *Coleman* staying with them and partaking of the same refreshments, and staying afterwards all night. These circumstances afford a strong apology for all that happened. Yet I am afraid of shaking great and fundamental principles. I dread the effect of the precedent, should we decide that they may in any case, except ABSOLUTE, UNAVOIDABLE NECESSITY, be departed from. No line is so easy to define as a strait one; and if the least departure from that be permitted, it will be difficult, if not impossible, to draw one capable of application in all cases of this nature. On these grounds, I am inclined to think we ought (for the sake of avoiding what may operate as a dangerous precedent) to set aside this inquisition: though I am well satisfied with the judgment, both of the County Court and the District Court, upon every other ground.

Judge ROANE. Upon a thorough consideration of the testimony in this cause, I am of opinion that the appellee ought to have leave to raise his dam according to the prayer of his petition. If, however, the testimony were doubtful, I should certainly respect the concurring judgments of the County and District Courts, tribunals sitting in the neighbourhood, as was done by this Court in the case of *Home* v. *Richards*, 2 *Call*, 507.

As to the objections taken to the regularity of the *proceedings*, none of them, in my view, are important.

The inquisition having found that damage would be done to the estate of *Thomas Rowlett*, deceased, it became the duty of the *Court* to issue a summons to the tenant or proprietor thereof. The Court ordered one to be issued to *Thomas Coleman*, who is also stated therein to be "trustee and acting executor of *Thomas Rowlett*, deceased."

Coleman appeared and contested the motion on the merits. After this, we are not at liberty to say without any evidence to that effect, (and thus convict the County Court of error in issuing the summons to an improper person,) that he was not, in fact, the tenant or proprietor of the land within the meaning of the act. He might have been so, the description given to him, of "trustee and execu- "tor," notwithstanding.

As to the notice given to him by *Moody*, in that character, in the first instance, it was mere supererogation, and consequently will not affect his rights.

With respect to the objection to the writ of *ad quod damnum*, in that it *confines* the Jury in their estimation of damages to the height of fifteen feet two inches, the answer is that the writ corresponds in this respect with the real application to the Court, and being, besides, beneficial to the opposing party, cannot be objected to on this ground by him.

As to the objection to this inquisition on the ground that the Jury drank some spirits and water at the cost of the appellee; while I heartily join with the Judge who preceded me in wishing to keep the jury-trials as pure as possible, and also think, with him, that, in general, the same necessity for circumspection equally holds in relation to inquisitions of office which are held *in pais* and out of the sight or control of a Court of Justice, I must be permitted to say that nothing shewn in evidence in this case ought to impeach the present verdict. At the same time, also, that I readily make the foregoing admissions, I do not agree that all the rigid doctrines of the ancient common law in respect to eating or drinking by a Jury, and which are laid down in relation to perhaps a *short* trial in a comfortable jury-room, equally apply to the laborious duties required by an inquisition in the country, where, from the necessity of the case, the jurors must have a reasonable refreshment. We must not be governed by the *letter* of the rule under every possible state of things, but take a more liberal and enlarged view of the circumstan-

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ces. I presume it will not at this day be contended, that in this laborious service the jurors might not have refreshed themselves at their own expense: but we are to consider the case as it is, where the refreshment was furnished by one of the parties. In considering this case, we must recollect that the Jury in question was not acting in a populous city where they might have got refreshment at their own cost, and where a *party* could from no motive, except an interested one, have furnished it at his cost. The jurors summoned on this inquisition had perhaps most of them rode many miles that day; there was, probably, no public house near, from which refreshment could have been obtained; the weather was, probably, very hot; and therefore a kind of necessity existed for the appellee's offering, and their accepting, the trivial refreshment now made the ground of opposition to the verdict. The character for hospitality of our countrymen, too, ought not on this occasion to be entirely lost sight of. That circumstance, perhaps, taken in connection with the real necessity of the case, furnishes a clew for the offer in the present instance very distinct from any view to corruption on the part of the appellee. If the terms of the act concerning *roads* has expressly inhibited all kinds of refreshment to the Juries who are acting upon them, notwithstanding the possible hardships which may result therefrom to the jurors, the omission to insert a similar provision in the act respecting mills leaves those cases on the footing of the common law; in applying the provisions of which, however, we must adapt them to the circumstances of the case, and so as to effect a reasonable and *substantial* compliance therewith, rather than a *literal* one. So far as the provisions of the statute are express and imperious, let them prevail; but, as to any case not embraced by it, let such case be considered independently of its provisions.

I need not, however, consider the present case in a general point of view. The testimony in the cause shews, abundantly, that *Coleman* CONSENTED that the Jury should take some refreshment, and set them the example. We

do not sit here to lay down mere abstract propositions, but to administer justice: and shall we set aside a verdict, in favour of a man who is proved to have deliberately and freely WAIVED the objection which his counsel long after may think proper to set up? We are in the habit, every day, of disregarding errors which are beneficial, or not injurious to parties, or to which they have bound themselves not to object. On this ground, and *referring particularly* to the testimony in the cause in support of this part of my opinion, I must think the verdict in the present case ought not to be impeached, and that the judgment ought to be AFFIRMED.

Judge FLEMING. The only difference in the opinion of the Court, arises from the circumstance of the *Jury* having taken a little refreshment of spirits and water, in the first instance, before they were impanelled and sworn, and after they had finished their examination and were on their return towards the house, they took a drink of grog; (says *Baptist*, the sheriff;) and after returning to the house, they reported their verdict, and whilst he and the surveyor were writing the inquisition, they took some spirits and water; but neither the sheriff nor Mr. *Quie* (another respectable witness who spoke of these circumstances) saw any thing like intoxication in either of the jurors.

Although the law, in order to preserve the purity of trials by Jury, (justly considered as one of the chief excellences of our constitution) has inhibited jurors from taking either meat or drink, or even the use of *fire* or *candle*, whilst consulting of their verdict, which, says Lord *Coke*, some books call an imprisonment,(*a*) thos e rules are more strictly observed in *England* than they are, or ought to be, in this country, where the habits, manners and genius of our people are widely different. Though *here*, I should be far from countenancing or tolerating *embracery*, or any thing that might tend to corrupt or bias the minds of a Jury; but in the case before us nothing of the kind, to my mind, appears; and I am persuaded that the appellee had

(*a*) *Co. Litt.* 227. b.

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no sinister object in view, in producing the spirits spoken of in the evidence, but was actuated *merely* from a motive of hospitality and kindness, for which our citizens are generally distinguished: and I am the more confirmed in this opinion, from the circumstances of his caution in consulting the appellant, (the only person to be affected by the verdict of the Jury,) who readily gave his assent, and set an example himself, by taking a drink of grog before either of the jurymen; and it is laid down in *Co. Litt.* 125. b. "that all defects in *convening* or in the *qualifica-* " *tions* of the jurors, are aided by *consent* of parties; for " the rule herein is, that *omnis consensus tollit errorem.*" If, then, the consent of parties takes away *error* in the *qualifications* of jurors, I can perceive no good reason why such *consent* should not take away the error of their taking a little refreshment in a hot summer's day; but the taking such refreshment before they were impanelled and sworn, is not prohibited by the strict law in *England;* which, however, is admitted to be the law here also.

On this view of the case, then, I am of opinion, that the verdict was uncorrupt, and ought to be sustained, and that the judgment of the Court below ought to be affirmed.

By a majority of the Court, (absent Judge LYONS,) the judgment of the District Court was AFFIRMED; Judge TUCKER dissenting on the point of the refreshment taken by the Jury, only.

Ambler and wife *against* Norton.

Construction of the term *averment* in the act of Assembly, relating to dower; also how a jointure made by deed or will, in lieu of dower should be pleaded and proved.

ON the 20th day of *October*, 1800, *John Ambler* and *Catharine* his wife, late the wife of *John H. Norton*, deceased, sued out of the clerk's office of the *Winchester* District Court, a writ of dower against *George F. Norton*. The count demanded "one-third part of, and in a *freehold* "of a certain part or proportion of lot No. 62, situate in "the corporation of *Winchester*," by metes and bounds; "which they claimed as the reasonable dower of the said "*Catharine*, of the endowment of the said *John H. Nor-* "*ton*, deceased, her late husband, whereof she or they had "nothing, and whereof they complained that the said "*George F. Norton* deforced her," &c. The tenant pleaded, first, "that the said *John H. Norton*, or any other person "to his use, was not at any time, during the coverture of "the said *Catharine* with him, seised of an estate of *inhe-* "*ritance*, in the premises in the declaration mentioned, or "of any part thereof, and of this he put himself upon the "country, and the demandant likewise." Secondly, that "during the coverture aforesaid, viz. on the 19th of *No-*

1. Under the 11th section of that act, (1 *Rev. Code*, p. 171.) any estate conveyed by deed or will for a wife's jointure, in lieu of dower, *though not so expressed*, may be *averred* to have been so *intended*, and *parol* or other evidence *dehors* the deed or will, is admissible as to the relative situation of the parties, and circumstances of the testator, from which such intention may be inferred.

2. In pleading, it is not necessary to set forth the *whole* of a will, but only the *substance* of so much thereof, as relates to the point in question.

3. In averring a jointure in bar of dower, the failure to state in the plea, that the husband "being seised in *fee* of the premises" made the jointure, is not a *substantial* defect, nor sufficient to authorise the reversal of a judgment for the tenant, the defendant having failed to assign it as a cause of demurrer.

4. In such plea it is not necessary to state *expressly*, that the jointure was to take effect in possession immediately on the death of the husband, or that it was determinable by such acts only as would forfeit the dower at common law; it being incumbent on the demandant (in replying) to shew that any intervening estate existed, or that the jointure was subject to any condition, other than the law imposes on a dowress.

5. It is not essential to the validity of a jointure, that it should be exempt from any incumbrance, by judgments, statutes, mortgages, or bonds; the widow, if evicted of her jointure, having still a right to claim her dower.

6. If *personal* property be bequeathed, as well as *real* estate devised to the widow, the whole of such bequests and devises being averred to be in lieu of dower, her entering on the *real* estate is sufficient to shew her election to take the jointure, and in pleading, it is not necessary to state that she received the personal property also.

7. In pleading a jointure in bar of dower, it is not necessary to specify the name of the county in which the jointure land lies; provided the locality and identity of the land be described with *reasonable* certainty.

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" *vember*, 1792, the said *John H. Norton* duly made his " last will and testament, whereby he devised that the said " *Catharine* his wife, should receive an annual income of " 150*l.* during her life, out of the estate of the said *John*, " and that she should have the full use of the mansion- " house, and other houses of the said *John*, where the said " *John* did then live, together with the ground on which " they stand, and the garden, stable and stable let, during " the life of the said *Catharine;* likewise the free use " of all the household and kitchen furniture, plate, linen, " pictures, books, carriages, horses, cattle and house-ser- " vants for her life, and the said *John* did, in and by the " said will, also bequeath to the said *Catharine*, mulatto " *Hannah* and her issue; and the said *John* did afterwards, " to wit, on the 6th of *January*, 1794, duly make and " publish a codicil to his said will, whereby he bequeathed " to the said *Catharine*, *two hundred pounds during her* " *life*, in lieu of the one hundred and fifty pounds be- " queathed to her in the said will, and did moreover be- " queath to the said *Catharine*, black *Betty* and her issue; " and the said *John* did further, on the 13th day of *Octo-* " *ber*, 1795, duly make and publish one farther codicil to " his said will, whereby he bequeathed to the said *Catha-* " *rine*, all the plate to which he was entitled on the death " of Mrs. *Mary Prescott;* which said will, and the codicils " annexed thereto, have been duly proved and recorded in " the Court of *Frederick* County, and are now in full force; " and the said tenant in fact saith, the said several bequests " and devises, were in lieu of the said *Catharine's* right of " dower in the estate of the said *John*, and that the said " *Catharine* did, after the death of the said *John*, and be- " fore the commencement of this suit, actually enter into " and occupy the *greatest part* of the property, so as afore- " said devised to her, to wit, the mansion-house and other " houses where the said *John* did live, and the stable and " stable-lot and garden, and hath ever since been in the " possession and occupation thereof, in lieu of her dower " aforesaid, and this he is ready to verify," &c.

The demandants demurred to the second plea and averment of the defendant; and set forth for causes of demurrer the following, to wit, 1st. "The averment in the said "plea, is of matter not contained in the said will and co- "dicils, or either of them, or any part thereof, and the "tenant ought not to aver any thing out of the said will "and codicils; 2d. The averment aforesaid, is respecting "matter, which, if it exists, is matter of record, and ought "to be verified by the record, and is not so verified in and "by the said plea; 3d. The said plea is otherwise insuffi- "cient, defective and wants form." The tenant joined in demurrer, and, upon argument, the District Court adjudged the law to be for the defendant. Judgment was thereupon entered for him, and the demandants appealed to this Court.

This cause was argued at the *October* term, 1808, by *Call*, for the appellants, and by *Williams*, for the appellee. On account of the numerous and important points involved in it, the Judges took time till this term, to consider of their judgment.

Call, for the appellants, contended, that the plea was insufficient on two grounds: 1st. On the merits; 2d. In setting forth defectively the matter intended to be relied upon.

As to the merits, the question chiefly turns on the meaning of the word "*averment*" in the act of Assembly,(*a*) which ought to be taken in the sense in which it was generally received, both in law and equity, at the time of passing the act. According to the authorities, the averment permitted is not of any matter *dehors* the will, but only of its construction, or of an implication evidently deducible from its words,(*b*) because the *whole* devise must be in *writing*.

(*a*) *Rev. Code*, vol. 1. p. 171. s. 11.

(*b*) 1 *Cruise's Dig.* 179. s. 22. citing 1 *Inst.* 36. b. 4 *Co. Rep.* 4. a. *Lawrence* v. *Dodwell*, 1 *Lutw.* 734.

It is a rule in pleading, that the legal *effect* and not the *words only* of an instrument must be set forth. In *Cook* v.

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Sims,(a) the note in writing which contained a promise, was actually set forth in the declaration; yet the judgment was reversed, because the *assumpsit* (which was the legal effect) was not expressly laid. In 2 *Saund.* 97. c. the case of *Baker* v. *Lade*, 3 *Lev.* 291. is quoted, in which the judgment was reversed in K. B. because the defendant had pleaded the words of the deed, without stating to what purpose he intended to use them; and other cases to the same effect are there cited. When, therefore, the words of the will are not expressly, that the estate devised shall be in lieu of dower, the tenant must aver that the estate was so devised, and prove it by the implication. Parol evidence is not admissible, except to explain some latent ambiguity, or to prove a latent fact, relative to the situation and nature of the estate, but not inconsistent with the words; as in the case of a bequest to the testator's son *John*, there being two sons of that name; or of a bequest of 150*l.* to the wife, and 150*l.* to another person, where the whole estate is worth only 200*l.* there the collateral fact of the *value* of the estate, may be proved by parol evidence; because, if the wife were to have her dower as well as the 150*l.* the other legatee would be defeated altogether.

(a) 2 *Call*, 39. 374.

Even in equity, (except in *such cases*,) no averment *dehors* the will is admitted. 2 *Ves.* jun. 572, *French* v. *Davis*. 3 *Ves.* jun. 249. *Strachan* v. *Sutton*. 1 *Cruise's Dig.* 203. citing 3 *Atk.* 8. *Tinney* v. *Tinney*. 4 *Bro. Ch. Cas.* 410. *Middleton* v. *Cator*. 6 *Ves.* jun. 615. *Gretorex* v. *Carey*, are clear and positive authorities to this point.

Every statute should be construed so as to prevent mischief, if possible. The mischief of a different construction of the act now in question would be, that the statute of *frauds* would be repealed as to this case, which would injure the rights of a defenceless part of the community; and this, too, without any reciprocity in the rule; for the widow cannot by parol evidence, get more than the words give her. The legislature could not have intended to introduce so great a mischief.

Both statutes according to my construction can have effect. There is also internal evidence in the statute relative to dower of an intention to conform to the existing laws; for the jointure to be effectual as a bar to dower, must in the first place be of *real* estate; 2dly. It must take effect in the widow's own possession, immediately on the death of her husband; 3dly. It must continue during her life at least; and, 4thly. Be determinable by such acts only as would forfeit her dower at common law; in all which respects our act agrees with the pre-existing law. The fair inference is, that the existing law was in the contemplation of the legislature.

2. This plea is defective in not saying that the husband was seised in fee, and capable of conveying an estate sufficient to bar the dower. In 3 Lord *Raym.* 151. the pleadings in *Laurence* v. *Dodwell*(*a*) are inserted; and there the husband is stated to have been seised "in his demesne as "of fee;" whereas, here, *John H. Norton* is only said to have been seised of a *freehold.* In *Dyer*, 361. b. *Beamond* v. *Deane*, the tenant having pleaded in bar an assignment of rent made by himself to the demandant, on demurrer, the plea was held to be bad, because it did not allege that he was seised of the land, &c. at the time of the assignment, and that it could not be supplied by intendment. *Co. Litt.* 303. b. *Plowd.* 104. and *Bac. Max.* 340. prove that no implication can be made for the pleader in such a case as this; for if the words of a plea are capable of two intendments, it must be taken most strongly against him who pleads it.

(*a*) Cited *ante*, from *Lutw.* 734. and also reported in 1 Ld. *Raym.* 438.

3. Another defect. The plea does not aver that the devise was *accepted.* In *Story's Pleadings*, 358. such is the form, taken from a plea of the late Lord *Camden.* In the case from Lord *Raymond*, the plea expressly stated that the widow entered "*by virtue of the devise.*" But in this case it is merely stated that she *entered.* The inference is as fair that she entered *tortiously*, as that she did so by virtue of the devise. This not being averred, the words must be

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taken most strongly against the pleader according to the rule before mentioned.

4. Again; it should have been averred that she took the estate, *in lieu of dower*, by virtue of the words of the will, or by virtue of some latent ambiguity or latent fact as aforesaid. The rule is that, where a record or will is relied on, the verification must conclude "as in the said "record or will more fully appears;"(*a*) and if a latent ambiguity or latent fact is relied on, such ambiguity or fact must be specially stated.(*b*)

(*a*) *Dyer*, 27. b.

(*b*) *Story*, 358.

5. Another objection is, the plea states sundry things as devised in lieu of dower, yet does not say that she accepted the *whole*, but only the *greatest part*, to wit, the mansion-house and lot. Now the whole was intended as the bar, or nothing. Her getting a part only was not sufficient. The pleader ought to have shewn what became of the rest. So, in accord and satisfaction, *part* satisfaction is not sufficient.(*c*)

(*c*) 1 *Bac. Abr.* (*Gwil.* edit.) 43. *Roll. Abr.* 129. *Bacon's Dig.* 281.

It may be urged that this is on a demurrer; and that several of these objections which were not assigned as causes of demurrer, must be considered as on a *general* demurrer; but either way, the effect is the same; for these exceptions are of the *gist* and essence of the bar. As to the *seisin*, and as to the *acceptance*, each of them is an essential pivot on which the cause turns. So, the testator intended the *whole* devise, or no part of it, as a bar; and it is essential to shew that she accepted the *whole*. If issue had been taken on this plea, and a general verdict found for the defendant, judgment might have been arrested, because the plea left every thing *in dubio;* and whatever is ground for a *repleader*, applies more strongly, on a demurrer, against the person pleading.

Williams, for the appellee. The first question to be considered is, whether the matter stated in the plea is a bar to the appellant's claim of dower; 2dly. If so, is the matter sufficiently pleaded *upon this demurrer?*

1. The language of the act of Assembly is, "If any estate be conveyed by deed *or will, either expressly or by averment*, &c. The legislature certainly intended by this word *averment*, something more than was expressed in the deed or will; for otherwise the first part of the sentence would have answered their purpose; but they use the term *averment*, an expression which is not to be found in the statute 27 *Hen.* VIII. c. 10. and therefore, if the construction of that statute had been such as Mr. *Call* contends, it does not follow that a similar construction should be applied to our act. Besides, the statute 27 *Hen.* VIII. speaks only of *deeds*, but our act speaks of *wills* also. In consequence of the silence of the statute as to *wills*, Lord *Coke*, in his commentary upon *Littleton*, 36. b. says, that a gift by *will*, unless expressly in lieu of dower, is not a bar; but he admits that a *deed* made to the wife, or for her use, and accepted after coverture, although not expressed to be in lieu of dower, is a bar, and may be so averred. This point is also settled in 4 *Co. Rep.* 3. *Vernon's* case.(*a*) So that, though the words "by averment," are not in the *English* statute, yet an averment of a matter not expressed in the deed, was even there allowed. The cases of *Arnold* v. *Kempstead and wife*,(*b*) *Villa Real* v. Lord *Galway*,(*c*) *Jones* v. *Collier*,(*d*) *Wake* v. *Wake*,(*e*) and *Pearson* v. *Pearson*,(*f*) are all to a similar effect.

(*a*) 2 *Tuck. Black.* 137. note a.

(*b*) *Ambl.* 466.
(*c*) *Ibid.* 682. and 1 *Bro. Ch. Rep.* 292. S. C.
(*d*) *Ambl.* 730.
(*e*) 3 *Bro. Ch. Rep.* 255.
(*f*) 1 *Bro. Ch. Rep.* 292.

It is objected by Mr. *Call*, that in the case of a *will*, nothing can be averred but what can be gathered by implication or construction from the will itself, or a latent ambiguity. But, according to his own ideas, the legislature must be supposed to have understood the distinction between a deed and will, established by the *British* authorities under the statute of *Hen.* VIII. and therefore, as our act of Assembly has put a gift by *will* on the same footing with a gift by *deed*, those authorities must now apply to the case of a *will* in the same manner as to that of a *deed*.

He says, too, that permitting the averment would amount to a repeal of the statute of *frauds*, which is incorporated

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into our act concerning wills.(a) The second section of that act saves to the widow her dower; and the clause now under consideration of the act relating to dower, (passed the same session,) provides that she may have her dower, but that, if she claims as *devisee*, it may be averred that she was not to claim dower also. Is there any inconsistency in this? or can our construction of the latter clause operate as a violation or repeal, of any part of the act concerning wills? She takes by the will: but the legislature says that, under such a state of things, she shall be barred of her dower at common law; provided it appears that such was the testator's intention. So, no estate can pass but by *deed*, &c. yet a consideration not expressed in the deed may be averred. In the case of a *legacy*, too, it may be *presumed* to be in satisfaction of a debt due from the testator to the legatee.(b)

(a) *Rev. Code*, vol. 1. p. 160. c. 92. s. 1.

(b) 2 *Vern.* 498. *Brown* v. *Dawson.*

In this case the plea states, that he devised to her 200*l.* to be paid annually out of his estate, and gave her the mansion-house, &c. which she entered into, and has occupied ever since his death, in lieu of dower. If it had been necessary to draw the averment from the will, his charging his estate with payment of an annuity, would fairly lie in averment that it was in lieu of dower. But,

2. It is said, that the matter is not sufficiently set forth in the plea. To this I answer, that the demurrer is general, except as to two causes, viz. 1. That he avers things out of the will; 2d. That the plea respects matters of record, and ought to be verified by the record.

The other objections made by Mr. *Call*, being only matters of *form*, and not having been mentioned in the demurrer, he cannot now avail himself of them.(c) The averment is, that the said several bequests and devises *were in lieu of dower*, and that after the death of the testator, she actually entered and enjoyed the *greater part*, (being all the *real* property devised,) and that she hath ever since been in possession thereof, *in lieu of her dower aforesaid*. If this plea is not sufficiently formal, it certainly

(c) 5 *Bac. Abr.* (*Gwil.* edit.) 464. *Rev. Code*, vol. 1. p. 112. s. 27.

contains the substance of the bar, and would have been good after verdict, or on a general demurrer. The rule is that, where a plea sets forth a good bar defectively, upon a general demurrer it will be good; but, if it sets forth a defective title or bar, it is otherwise. Here the real *gist* of the bar is the devise for life in lieu of dower; and this is set forth substantially. The want of a *profert* of the will is unimportant; for a will is not such a paper as the law requires to be pleaded with a *profert;* it being sufficient to set out the *substance*, as far as it relates to the case. A *profert* need never be made of a paper of which *oyer* cannot be demanded: but *oyer* cannot be demanded of a *will;* because it is in the custody of the law, and equally open to the examination of either party. Besides, in this case, the averment is not made upon the will alone, but upon matter *dehors* the will.

However, even admitting the plea to be as defective as Mr. *Call* supposes, the *count* is defective also; for the demand is of the third part of a *freehold* only; whereas dower cannot be claimed except of a *freehold of inheritance*, or an inheritance in *fee-simple*. The demandants, therefore, having committed the first fault in pleading, cannot have judgment.

Call. There is nothing in the exception taken to the *count;* as it is conformable to all the precedents. He referred to *Booth on Real Actions*, 166. *Coke's Entries*, 176. 179. *Rastall's Entries*, 229. *Crompton's Practice*, 316. and 10 *Wentworth's Pleadings*, 157. 163.

Curia adv. vult.

Saturday, May 6, 1809. The Judges delivered their opinions.

Judge TUCKER. The appellants, one of whom was the widow of *John H. Norton*, brought a writ of dower against *G. F. Norton*. The count demands one-third part of, and in a *freehold*, of a certain part or proportion of a

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lot in the town of *Winchester*, by metes and bounds. The tenant pleads, first, that the said *J. H. Norton*, or any other person to his use, was not at any time during the coverture, &c. seised of an estate of inheritance therein, and thereupon issue was joined. Secondly, that the demandants ought not to have or maintain their action, &c, because he says, that during the coverture, &c. the said *J. H. Norton* duly made and executed his last will and testament, whereby the said *John* devised that the said *Catharine* his wife should receive an annual income of 150*l.* during her life, out of the estate of the said *John*, and that she should have the full use of the mansion-house and other houses of the said *John*, where the said *John* did then live, (*not saying where or in what county*,) together with the ground on which they stand, and the garden, stable, and stable-lot, during the life of the said *Catharine*; likewise the free use of all the household and kitchen furniture, &c. for her life; and the said *John* did, in and by the said will, also give and bequeath to the said *Catharine*, mulatto *Hannah* and her issue; and the said *John* did afterwards, during the coverture, &c. duly make and publish a codicil to his said will, whereby he bequeathed to the said *Catharine* 200*l.* during her life, (*not saying by the year*,) in lieu of the 150*l.* bequeathed to her in the said will, and did moreover bequeath to her black *Betty* and her issue. And the said *John* did also, during the coverture, &c. duly make and publish one further codicil to his said will, whereby he bequeathed to the said *Catharine* all the plate to which he was entitled on the death of *M. P.* which said will and the codicils annexed thereto, have, since the death of the said *John*, been duly proved and *recorded* in the *Court* of *Frederick County*, and are now in full force. And the said tenant in fact saith, that the said SEVERAL *bequests* and *devises* in the said will and *codicils* before set forth, were *in lieu of the said Catharine's* right of dower, in the estate of the said *John*, and that the said *Catharine* did, after the death of the said *John*, and before the commencement of this suit actually *enter into and oc-*

cupy the GREATEST PART of the property so as aforesaid devised to her, to wit, the mansion-house and other houses, where the said *John* did live, (*not saying where or in what county*,) and the stable, &c. and hath ever since been in the possession and occupation thereof in lieu of her dower aforesaid, and this he is ready to verify, &c. and therefore prays judgment, &c. To this plea the demandants demurred specially; and for causes of demurrer they say, 1st. That the averment in the said plea is of matter not contained in the said will and codicils, or either of them, or any part thereof, and the said tenant ought not to aver any thing out of the said will and codicils. 2d. The averment aforesaid is respecting matter, which, if it exists, is matter of record, and ought to be verified by the record, and is not so verified in and by the said plea. 3d. The said plea is otherwise insufficient, defective, and wants form. The tenant joins in the demurrer.

As this is the first case that has occurred in this Court, wherein a similar plea in bar has been pleaded, since the passage of the act concerning dower, wherein it is enacted, among other things, "That if any *estate* be CONVEYED by "*deed* or *will*, either *expressly* or by *averment*, for the join-"ture of the wife in lieu of dower, to take effect and con-"tinue as in the act is expressed, such conveyance shall "bar her dower," &c. I shall enter somewhat at large into the consideration of the questions arising upon this demurrer.

As to the first of these points; I conceive that whatever averment might have been made in *England*, in respect to a DEED of lands, as meant, or intended, to be made in satisfaction of dower, may, since the act concerning dower, ed. 1794, c. 94. s. 11. was made, be made in this country in respect to a WILL, as well as a DEED; the intention and design of that act, being to put any provision made for the wife, by way of jointure, subsequent to the marriage, upon the same footing to all intents and purposes, whether made by *will* or *deed*. By the common law, according to the resolution in *Leake* and *Randall's* case, cited 4 *Co.* 4. if a man devised

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lands to his wife for term of life, *generally*, it could not be averred to be for the jointure of the wife, and in satisfaction of her dower, for two causes: 1st. Because a devise implies a consideration in itself, and therefore a devise cannot be averred to be to the use of another than the devisee, if it be not so *expressed* in the will; no more can a devise be averred to be for a jointure if it be not *expressed in the will.* But it shall be taken for a benevolence. 2d. The *whole will* concerning lands ought to be in *writing*, and no averment ought to be taken *out of the will*, which *cannot be* COLLECTED *by the words in the will.* But, if it were *expressed* in the will, that the devise was made in lieu and satisfaction of dower, the same was good by way of jointure, and bar of dower; if she accepted the same. 4 *Co.* 4. *Co. Litt.* 36. b. And this case was cited and approved by the whole court of *B. R.* 1 Lord *Raym.* 438. in *Lawrence* v. *Dodwell.* In a report of the same case by *Lutw.*(*a*) *Treby*, Ch. J. said, if it had been said (in the will) that the devise to the demandant was for her jointure, it had been good; and so, although the word *jointure* had not been in the will, if there had been other words therein tantamount; as if it had been said, that the devise was for a *provision* for the wife, or other words of the like kind, so that the INTENTION *of the testator might appear by the* WORDS *of the* WILL; but NO EVIDENCE OUT OF THE WILL *can be admitted;* for then, one part of the will would be in writing, and the other not: *parol discourses* OUT OF THE WILL are of no signification, for it must be entirely in writing. And to the same effect is Lord *Raymond's* report of that case, who says, that judgment was given for the demandant by the whole Court; because the averment, (in that case,) being matter *out of the will, and not contained* in it, OUGHT NOT TO BE ALLOWED.(*b*) And the same rule as to averments, I apprehend, applies also to a deed, as well as a will; the general rules of construction being the same, as to both: and therefore no implications can be allowed but such as are necessary,

(*a*) Vol. 1. p. 787. old ed

(*b*) 1 Lord *Raym.* 438. *Vide* 3 Lord *Raym.* 151. where the plea in that case will be found.

or at least *highly probable*; and not merely *possible* implications.(*a*) In the case of *Tinney* v. *Timney*,(*b*) where a bill was brought in the High Court of Chancery for dower, the heir at law insisted that the husband, in his life-time, gave a bond for 1,000*l.* in trust, to secure to his wife 500*l.* in case she survived him, and that it was intended at the time in lieu of dower, and that she acknowledged it to be so, and offered to read evidence of her acknowledgment. But Lord *Hardwicke* was of opinion that parol evidence could not be allowed in that case, *being within the statute of frauds and perjuries*, and that a *general* provision for a wife was not a bar of dower, unless *expressed* to be so: but that a bond to secure a sum of money, *for her livelihood and maintenance*, had been decided to be within the equity of the statute of *H.* VIII. of jointures. This is perfectly conformable to the opinion upon the will, in the case of *Lawrence* v. *Dodwell*; and since the provisions of the *English* statute of frauds and perjuries are ingrafted into ours respecting wills and conveyances, the construction ought to be the same here as there. Now certainly there is no expression in the will, so far as the same is set forth in the plea, by which it can appear to the Court, whether the devise of the dwelling-house, &c. was intended to be in *satisfaction* of dower, or not: for, if it were so *intended*, it ought to be in satisfaction of her *whole* dower, and not of *a part* only.(*c*) But by the terms of this averment, it would appear that the devise of the *house and lots* was only *in part* satisfaction. For the words are, "and "the said tenant in fact saith, that the said SEVERAL *be-* "*quests* and *devises* in the said *will* and *codicils* before set "forth, were in lieu of the said *Catharine's* right of dower "in the estate of the said *John*;" which shews that the devise of the *dwelling-house*, &c. must, *at law*, be in *part* satisfaction only and not for the *whole*. And if they were in *part* only, the devise thereof is no bar, 4 *Co.* 3. *Co. Litt.* 36. for a bequest of *personal* estate is no bar of dower in *lands*, as was adjudged in this Court in the case of *Blount*

(*a*) 2 *Black. Com.* 381.
(*b*) 3 *Atk.* 8.
(*c*) 4 *Co.* 3. a. *Co. Litt.* 36. b.

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v. *Gee.*(*a*) The case of *Eastwood* v. *Vinke*,(*b*) is in principle not unlike the present. A man on his marriage gave a bond to a trustee in a penalty, conditioned that if, within four months, he should settle and *assure* freehold lands of the value of 100*l.* *per ann.* the bond to be void. The husband soon after the marriage made his will and devised certain freehold and *copyhold* lands, lying intermixed, of the yearly value of 88*l.* to his loving wife and her heirs, and died within the four months. The Master of the Rolls said, "as money and lands are things of a different nature, "one shall not be taken in *satisfaction* of the other. "Whatever is given by a will is *prima facie* to be intend- "ed a bounty, or benevolence. The devise of such of the "land as is *copyhold* cannot possibly be taken towards "*satisfaction* of the 100*l.* *per ann.* which was to be *free-* "*hold.* *Nay*, supposing the whole 88*l.* *per. ann. were* "*freehold*, it would not go TOWARDS *satisfaction* of the "100*l.* not being so *expressed*:" and this decree was affirmed by the Chancellor. The averment, therefore, is so far from being proved by the words of the will and codicils, that to me they seem to contradict it, in express terms.

(*a*) *Nov.* 1, 1805, MS.
(*b*) 2 *P. Wms.* 613.

But it may be objected that the bequest of the annuity out of the testator's estate, must be taken as a devise of a *real* estate, and therefore, coupled with the devise of the dwelling-house and lots, must be intended, as a satisfaction for the *whole* and not a *part* only, of her right of dower. To this there are several answers. 1st. It is not averred that the testator had lands to that value, and therefore the devise may fail. 2d. It is not shewn out of what lands (if he had any) the annuity should be paid; but only that it should be paid *out of his estate;* which might be wholly *personal* except this lot; nor when it should commence; nor that any power of *distress* or *entry* was given, in case it should be withheld; nor is it shewn whether, if he had lands to that value, he had *such an estate* therein, as that her estate therein should not be forfeitable, or determina-

ble by such acts only as would forfeit her dower at the common law. For if he were tenant for a hundred or a thousand years, of lands to the value of the annuity, a devise thereof would be no bar of dower. So, if he were tenant *pur autre vie*, or even for several lives; for peradventure the term may expire, or be forfeited by the *actual* tenant's committing waste, or some breach of condition, in deed, or in law, without her fault.(*a*)

There is another ground upon which it may be questioned whether this plea and averment are so pleaded as that the Court can judge whether the devise is to be taken as a bar and satisfaction of dower or not. By the statute against fraudulent devises, any creditor by bond or other specialty, wherein the testator and his heirs were bound, might maintain his action of debt against the heir and devisee jointly, by virtue thereof. Now suppose a bond creditor were to bring suit against the widow upon the bond of her husband, could she plead in bar of the demand, that the devise to her was in satisfaction of her dower, unless it were so expressed in the will? What then is the situation of a widow? If, when she accepts of a benevolence from her husband in his will, it may be averred that it was in bar of her whole dower, (although not so expressed or apparent,) and that she accepted the same in satisfaction thereof; the next day comes a creditor by bond; she cannot aver that the devise was in satisfaction of her dower, because not so expressed or apparent in the will, and the creditor sweeps the devise. Can this be right, or is it at all consistent with law, equity or moral justice? Again; suppose (as is very common) the testator shall have subjected his whole estate to the payment of his debts, *previous* to any devise or legacy, therein contained, taking effect; could this operate as a bar of a *legal right*, founded upon a valuable consideration, the marriage? Surely not. Ought not the will then to have been set FORTH AT LARGE, and pleaded with a *profert in curia*, that the court might judge upon the *whole of the will*, whether this devise was such a one, as could operate as a bar of dower, ac-

(*a*) 4 *Co. Vernon's case.* 3 *Bro. Ch.* 351. *Foster* v. *Cook.* 6 *Ves.* jun. 615. 4 *Bro. Ch.* 513. *Caruthers* v. *Caruthers.* *Rev. Code*, vol. 1. p. 171. c. 94. s. 11. 3 *Bro. Ch.* 255. *Wake* v. *Wake.*

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cording to the terms of our statute, which are so emphatical, that I must beg leave to recite them. "Also if any "estate be CONVEYED by deed or will, either expressly, or "by averment, for the jointure of the wife, in lieu of her "dower, *to take effect in her* OWN POSSESSION, IMMEDIATE-"LY *on the death of her husband, and to* CONTINUE *during* "*her life* AT THE LEAST, *determinable by such acts* ONLY, "*as would forfeit her dower* at the *common law*, such con-"veyance shall bar her dower of the residue of the lands, "which at any time were her said husband's." Can a devise *after* payment of debts,(*a*) or a devise of an estate by law, *subject* to the *payment* of *debts by specialty*;(*b*) or of an estate determinable in any manner during the life of the wife, by any act which would not amount to a forfeiture of dower at the common law, or by *any other* cause, be averred to be in satisfaction of the dower of the wife, unless the testator's intention to that effect, be either *expressed* in, or *apparent* upon, the face of his will? And, if not, can this Court decide the question of such intention, without having the whole will and codicils before them? And if that be necessary, ought there not to be in every case, a *profert in curia* of the will, or an authentic copy thereof, that the Court may, upon inspection, judge of the testator's intention, and of the operation of the law upon the devise, taken with the rest of the will, as such a satisfaction, as the law requires, to be a complete bar of dower?(*c*)

(*a*) *Vide Co. Litt.* 46. a. 4 *Rep.* 65. a.

(*b*) 4 *Rep.* 65. a.

(*c*) *Vide Lawrence* v. *Lawrence*, 1 *Eq. Ca. Abr.* 219. 1 Lord *Raym.* 438. S. C. 3 *Bro. Parl. Ca.* 483. S. C. *Incledon* v. *Northcote*, 3 *Atk.* 430. *Boynton* v. *Boynton*, 1 *Bro. Ch.* 445. *French* v. *Davis*, 2 *Ves.* jun. 572. *Foster* v. *Cook*, 3 *Bro. Ch.* 347. *Villareal* v. Lord *Galway*, *Ambler*, 682. 1 *Bro. Ch.* 292. S. C. *Pearson* v. *Pearson*, *Ibid.* 291. *Harg. Co. Litt.* 366. n.

Another objection to this plea and averment is, that it alleges that the widow after the death of the husband, and before the commencement of the suit, did actually enter into, and occupy the *greatest part* of the property so as aforesaid devised to her, to wit, the mansion-house and other houses, where the said *John* did live, (*not saying where, or in what county,*) and the stable, stable-lots and garden, and hath ever since been in the possession and occupation thereof, in lieu of her dower as aforesaid. Now these things which are thus alleged to constitute the *greatest part* (that is a PART *only*) of the SEVERAL *devises* and *bequests* before set forth, cannot, according to the authori-

ties before cited, be *averred* to be in *satisfaction* of the WHOLE; consequently, the entry into, and occupation of that part, could not operate as an *acceptance* thereof, in SATISFACTION *of the* WHOLE. Because this PART, the *mansion-house*, &c. is the only *real* estate devised to her; all the rest, for aught that appears to the contrary, being *merely personal* estate, and therefore no SATISFACTION.

Again; the entry into, seisin, and occupation of, the mansion-house, with the stable and garden thereto belonging, are matters of *fact*, which ought to have been so pleaded and averred as that a trial of those facts might have been had. But it is no where in the plea or averment mentioned, where, or in what county those premises lie; so that there is no *venue* laid. This appears to me to be a substantial defect in the plea. For by our law, "until "dower shall be assigned to a widow, it shall be lawful for "her to *remain* and *continue* in the *mansion-house*, and the "messuage or plantation thereto belonging, without being "chargeable to pay the heir any rent for the same, any "law, usage or custom to the contrary in any wise not-"withstanding."(*a*) The law then gave her a right to remain and continue in the *mansion*-house, &c. whether devised to her or not; or whether *accepted* by her in satisfaction of her dower or not, until such time as her dower (or full satisfaction for the same) should be assigned, or made to her. This then being a legal right, of which she could not be deprived, the fact of the ENTRY, and, in *what right* such entry was made, ought to have been so pleaded as to be triable by a Jury of the vicinage. But the mansion-house, into which the entry is alleged, not being alleged to lie in any particular County or place, the plaintiff might not be prepared to repel the evidence which might be offered to prove the fact. For, if the husband had more than one *mansion-house*, evidence might be offered of an entry into one, as well as another; so that the plaintiff might be unable to meet it. And I hold it to be an invariable maxim in pleading, that every substantive plea in bar, in which any new matter of fact is alleged, affirmatively, and with-

(*a*) *Rev. Code*, vol. 1. p. 170. c. 94. s. 2.

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out reference to any matter of fact before alleged in the pleadings, must be pleaded so as that an issue in fact may be made and joined thereon; or, in other words, that there must be such circumstances of time and place alleged, as constitute a *venue* in law, otherwise such plea is substantially bad.(*a*) If a special justification, or other matter pleaded in bar, be *local*, the defendant must plead it in the proper County where the matter arose; and, at the common law, the cause must have been tried *there*; otherwise it was error.(*b*) And it is a general principle, that the want of a *venue* is only curable by such a plea as admits the fact for the trial whereof it was necessary to lay a *venue*: and, though it is aided after a verdict, in *England*, by statute 16 and 17 *Car.* II. yet there is no such provision in our statute of *jeofails*.

(*a*) *Co. Litt.* 303. b.

(*b*) 1 *Saund.* 247. n. (1).

But, it may be objected, that this is a *special* demurrer; and this omission to lay a *venue* is not assigned as a cause of demurrer. I have already said, the omission to lay a *venue* is matter of *substance*; and, though it be true, that a demurrer confesseth all such facts as are *sufficiently* pleaded, matters not sufficiently pleaded, are not admitted by a demurrer.(*c*) And though it be also true, that he that demurs specially can take no advantage of any other matter of *form*, than what he hath expressed in his demurrer; yet he may of any other matter of *substance*.(*d*) Where the defendant pleaded Queen *Elizabeth's* letters patent, (as the defendant in this case hath the will of the husband,) without a *profert in curia*, in bar to an action of trespass, to which the plaintiff demurred, and for cause of demurrer, alleged that the defendant's plea amounted only to the general issue; judgment was given for the plaintiff for this reason; because there was *no profert in curia* made of the letters patent, which was matter of *substance*. Here, then, the plea is *substantially* bad, in my opinion, not only because there is no *venue* laid, which I hold to be matter of *substance*; but because there is no *profert in curia* of the husband's will; (or of a certified copy thereof at least;)

(*c*) *Hob.* 56. 5 *Co.* 69. *Co. Litt.* 72. a.

(*d*) 10 *Co.* 88. *Leyfield's* case.

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but a *part* only, and not the *whole* of the will is set forth in the plea; so that the Court cannot make such a construction thereof as the law requires, viz. that the construction be made upon the entire deed, or will, and not merely on disjointed parts of it.(a) In *Vernon's* case,(b) where the demandant in her replication relied on the will of her husband, we are told that *she shewed all the will in certain.* And the same ought to have been done here. Then, with respect to the *venue*, as to the entry into the mansion-house, in the same case, the tenant pleaded, that the husband was seised of other lands (besides those whereof dower was demanded) *in the same County*, in his *demesne as of fee*, and by deed enfeoffed certain trustees and their heirs, to the use of himself for life, and after his decease to the use of the demandant, his wife, for her life, &c. and averred that the said estate, limited for life to the demandant, was for her jointure, and in full satisfaction of her dower; and that after the death of her husband, the demandant entered into the said land so limited to her for her jointure, and agreed to the same. And therewith all the forms agree; which shews that the laying the *venue* in such a plea is matter of substance: it shews, moreover, that the estate of the husband in the lands settled, or devised, ought to be shewn, that the Court may judge whether the estate of the wife therein be such, as is *determinable* ONLY by such acts as would forfeit her dower at the common law. But the case of *Ilderton* v. *Ilderton*,(c) in which to a plea of *ne unques accouple in loyal marriage* it was replied by the demandant, that she was married at *Edinburgh*, in *Scotland*, without laying a *venue* in *England*, and the replication was held good upon a special demurrer, for that cause, may be considered as overruling the objection to this plea, for want of a *venue*. But I am of opinion it does not: First, the fact of the marriage was alleged to be in another kingdom; to which the process of the Court did not extend. Secondly, it was of such a nature as was not triable by Jury, if alleged to have taken place in *England*, but by the bishop's certifi-

(a) 2 *Bl.* 379.
(b) 4 *Co.* 1.
(c) 2 *H. Bla.* 145.

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cate. *Thirdly*, it was a collateral and transitory fact, which might happen in any County, and therefore the trial of the *principal* matter, where there was a *venue* already laid, would draw to it the trial of this *collateral* and *transitory* matter. See also *Mostyn* v. *Fabrigas*, *Cowper*, 176, 177. with respect to the distinction between *local* and *transitory* matters. Fourthly, that case turned upon the question, whether the practice in respect to *replications*, *must be governed* by the same rules, as were *admitted* to prevail in declarations and pleas ; and the Court held, that there were no precedents, by which the same strictness was required in replications, as in declarations, and pleas in bar

After what I have said upon the first point, and upon the merits as connected with it, I deem it unnecessary to say any thing upon the second point.

But an exception was taken to the *count* by Mr. *Williams*, which at first appeared to me to contain great weight : to wit, that the demand is of the third part of a *freehold*, and not of a freehold of inheritance, or of an inheritance in fee-simple. But the cases cited by Mr. *Call*, from *Booth on Real Actions*, 166. *Co. Entries*, 176. 179. *Rastall's Entries*, 229. as well as in later books of practice, (*Crompton's Pr.* 316. 10 *Wentworth's Plead.* 157. 163.) and the decision in *Davenport* v. *Tyrrel*, 1 *Black. Rep.* 679. that where a *seisin* is alleged in pleading, it shall be intended a seisin in fee ; for that, in pleading, the *larger* estate is always presumed ; (which last case I recollect to have heard Judge *Lyons* rely on, in this Court ;) have fully satisfied me that there is nothing in that exception.

Upon the whole matter, I am of opinion the demurrer to the plea ought to have been sustained ; and consequently that the judgment of the District Court ought to be reversed, and the cause sent back to be tried upon the issue joined on the first plea.

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Judge ROANE. This is a writ of dower *unde nihil habet*, brought by *Ambler* and wife for dower in a lot in the corporation of *Winchester*, which Mrs. *Ambler* claims as of the endowment of *J. H. Norton*, her former husband.

The tenant pleads two pleas : 1st. That the said *J. H. Norton* was never seised of an estate of inheritance in the premises during the coverture; on which issue is joined ; and, 2d. That the demandants ought not to have their action, &c. because, during the coverture aforesaid, viz. on the 19*th of Nov.* 1792, the said *J. H. Norton* duly made his will, whereby he devised that the appellant, *Catharine*, (his then wife,) should receive an ANNUAL INCOME of 150*l.* during her life, OUT OF THE ESTATE of the said *J. H. Norton*, and have the full use of the mansion-house and other houses where he THEN LIVED, garden, stable, &c. *during the life* of the said *Catharine*, (as also various bequests of personal property for life and in absolute property,) which will (with two codicils) was duly recorded in the Court of *Frederick*, since the death of the said *John*, and are now in *full force*. The plea goes on to *aver* that the SEVERAL bequests in the said will and codicils mentioned, were *in lieu of her dower*, and that she did, after the death of the said *John H. Norton*, and before the commencement of this suit, *actually enter into* and occupy the *greatest* part of the property *so as aforesaid devised to her, viz.* " THE MANSION-HOUSE, LOT," &c. (stating all the *real* property devised,) and hath ever since been in the *possession and occupation* thereof, *in lieu of her dower* aforesaid ; and this he is ready to verify, &c. To this second plea the demandants filed a demurrer, stating as causes thereof, 1st. " That the averment in the said plea is of " matter *not contained* in said will or codicils, or either of " them, and that the said tenant ought not to aver any " thing out of the said will and codicils ;" and, 2d. " That the averment *aforesaid* is respecting matter which, " if it exists, is matter of record, and ought to be verified " by the record, and is not so verified in and by the said " plea." To this demurrer there is a joinder; and, on

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arguing the demurrer, the Court adjudged the law for the defendants; from which judgment there is an appeal to this Court.

The question propounded by the first cause of demurrer, appears to have been a vexed question, perhaps, in *England*, as it relates to wills: but the most modern and satisfactory opinion seems to be, that where the devise is *expressed* to be in satisfaction of dower, or such seems to be *the clear and manifest intention of the testator*, the wife shall not have both dower and jointure.(a) This doctrine would be undoubtedly rendered more clear in favour of the *averment*, since the decisions in *Kennon* v. *M'Robert*,(b) and *Shermer* v. *Shermer*.(c) In those cases it was admitted to be law, that in collecting the *intention* of the testator as from the will itself, the *words* of the will are to be explained by the relative situation of the parties, and circumstances of the testator: facts derived from these sources, thus sanctioned, in relation to the construction of wills, may be as imperious as any *expressions* whatsoever, in the will, to import an intention to substitute the jointure for the right of dower. But the words of our act are so clear and explicit as to put this matter entirely at rest. They are, "if any estate be conveyed by deed or will, "either expressly, *or by averment*, for the jointure of the "wife, in lieu of her dower, to take effect in her own pos- "session, immediately on the death of her husband, and "to continue during her life at the least, determinable by "such acts only as would forfeit her dower at the common "law, such conveyance shall bar her dower of the residue "of the lands, tenements or hereditaments, which at any "time were her said husband's." The intention of the Legislature to this effect is still further manifested by the provision contained in the 12th section, (not to be found in the statute of *Hen.* VIII.) that where any estate *intended* to be in lieu of dower, shall, through any defect, fail to be a legal bar thereto, and the widow shall demand dower also, the estate limited to her *with intention* to bar dower shall thereupon *cease*. This provision, taken in addition

(a) 2 *Bl.* 138. *Christian's* note, and other authorities.

(b) 1 *Wash.* 162.

(c) *Ibid.* 172.

to the clear expressions of the act as aforesaid, puts the question beyond all doubt: it adopts that equity which always leans against a double provision: it overrules the grounds on which a jointure, unless so expressed in the deed or will, had been held to be *no* bar to dower, and which in 3 *Bac. Abr.* 712. are said to be, (as they are,) *contrary to justice;* and places the subject on the true ground of *intention* as it relates to the devisor; saving to the wife, in case of a jointure made during the coverture, the right to make her election after she becomes *sole.* While another clause of our act provides, that a widow expulsed from her jointure-land shall recover dower *pro tanto*, the clause just mentioned, on the other hand, confines her to dower *only*, where the jointure estate should fail through "*any defect*" to be a bar thereto. This expression "any defect" embraces a defect of the want of averment, as well as any other, and the whole case is put upon the ground of *intention.* If it be said that this construction contravenes the spirit of the statute of frauds, the answer is, 1st. That the words of the act in question are express and positive; 2d. That the Legislature had power as well to depart from as to enact that statute; and, 3d. That the principle settled, or rather recognised, in *Kennon* v. *M'Robert*, and *Shermer* v. *Shermer*, will suffice for every purpose of the averment, and was not considered by the Court in those cases as infringing that statute.

As to the second cause of demurrer, the demandants (after having complained, in the first, that the matter averred was not contained in the will or codicil) object that the "*averment aforesaid*" is of matter of *record*, (meaning, I suppose, by the probate and recording of the will,) and ought to be verified by the record. It will readily occur here that the averment of a matter not contained in a will cannot be proved by the will: but, perhaps, the objection intended was, that the will itself should have been set out at large in the plea. As to this, it was rightly said by the appellee's counsel that the *substance* of a will, as far as it relates to the case, may be averred, and that the whole

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will need not be set out in the plea. In *Lawrence* v. *Dodwell*,(*a*) the will was not *set out*: it is true indeed that *Powell*, Justice, stated, as his opinion in that case, that, if any intent in the devisor had appeared that the devise was to be in bar of dower, the devise should have been pleaded at large: but this is only the declaration of a single Judge; no decision is found to support it; nor do the *forms of pleas bear out the idea* that it is necessary.

(*a*) 1 Ld. *Raym.* 438. See the *pleadings* in 3 Ld. *Raym.* 151.

The causes of demurrer assigned in this case being therefore incompetent to overrule the plea, let us see whether there are any other grounds competent to do it.

This case being upon a special demurrer, we are not to regard "any defect in the plea, except those assigned; "unless something so essential thereto, as that judgment "according to law and the very right of the cause cannot "be given, shall be omitted."(*b*)

(*b*) *Rev. Code*, vol. 1. p. 112. c. 76. s. 27.

Notwithstanding the comprehensiveness of the above terms, we must have enough in the plea to enable us to give judgment "according to law and the very right of the "cause." On this subject, I am of opinion, that what is substance, or not, is to be determined in every action according to its nature.(*c*) I also think we ought to adopt a principle, in relation to demurrers, analogous to that adopted in relation to general verdicts. In respect of *them*, it is held that, although a matter must have been proved to the Jury, and the *general words* of the act of *jeofails*(*d*) would seem to extend to *all* such cases, yet that the *gist* of the action must be laid in the declaration, or else a judgment thereupon cannot be given; so, in the case of a *plea*, the *gist* of the *bar* must be stated.

(*c*) 5 *Bac. Abr.* 404.

(*d*) *Rev. Code*, vol. 1. p. 112.

Under this distinction, I will briefly examine the objection that the plea ought to have stated that the testator, "*being seised in fee of the premises*," made the jointure in question. It is not denied that this is the *regular* form of pleading: but the question is whether this is *indispensable* upon a general demurrer. I have seen no decision shewing that it is. In this respect the plea is *as ample* as the act under which it is pleaded. That statute does not en-

act " that where *one seised of an estate of inheritance*, &c. " shall convey by will," &c. but that " if an estate be con- " veyed by deed or will, either expressly, or by averment, " for the jointure, &c. it shall bar dower," &c. This provision of the act would seem to determine what the *gist* of the plea really is; and this *gist* is stated in the plea in question.

When, in addition to this, it is provided by the act, that if the jointress shall ever be evicted, she shall recover her dower *pro tanto*, why may we not, according to the very right of the cause, give judgment against her, if the averment be proved or admitted to be true? She can, in no event, be left destitute; and, in making her election to accept the jointure, undoubtedly took into her consideration her husband's right to the premises conveyed in jointure. As it must appear to the Court that the estate conveyed in jointure has the requisites of the law, the widow, on the other hand, is to judge whether her husband was *capable* to convey it.

Again it is said that it ought to appear to the Court, that the devise of the jointure was to take effect in possession *immediately* on the testator's death, and not after payment of his debts. I answer that nothing of this is stated in the plea in the case of *Lawrence* v. *Dodwell*,(a) or any other pleadings that I have seen. As to the estate taking effect immediately, that is the natural inference from the facts stated in the plea, (and which are admitted to be true by the demurrer,) unless an *intervening* estate had been shewn to have been limited, which ought to have been shewn on the part of the demandants; and (as to the latter part of this objection) although a title to dower, having relation to the date of the marriage, is held to be discharged of judgments, statutes, mortgages, &c.(b) yet the husband has no power to exempt jointure-lands therefrom; nor is such exemption essential to the validity of a jointure. We are told by *Blackstone*,(c) that there are some advantages attending tenants in dower that do not extend to jointresses; and *vice versa*. He states them

(a) 3 Ld. Raym. 151.

(b) 2 Bac. Abr. 373.

(c) 2 Bl. Com. 138.

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particularly. If this exemption from incumbrances, &c. exists in favour of dower, whereas it does not in favour of jointures; so, on the other hand, the jointress finds an *equivalent* in her right to *enter* at once into her jointure-lands, and in their exemption from forfeiture for treason; privileges which do not exist in relation to *dower* lands.

It is also said that it ought to appear that the devise was not clogged with any condition whatever, other than such as the law imposes as a forfeiture of dower. The answer is, that the plea sets forth an unclogged devise for life, which is admitted, and it is not shewn on the other side to be otherwise.

Again, it is said, that the jointure-land, not being *solely* (but only in connexion with other property) devised for the jointure, is not a satisfaction for the *whole* dower. In the case of *Lawrence* v. *Lawrence*(a) *legacies* were coupled with the *jointure-land*, and did not prevent it from being held to be an adequate bar to the whole dower; as it would have been adjudged to be if in other respects the jointure had been held sufficient. As to its not being shewn that the widow entered into more than the *real* estate, she could not do so; but her entering into *that* shewed her election to take the jointure.

(a) 2 *Vern.* 365.

It is objected that the plea does not state that the devise was *accepted* in lieu of dower. But it does state that the jointure-land was "ENTERED *upon*" and enjoyed "in lieu "of dower." In saying that she *entered* on such land, it is conclusive that the wife did not merely *remain* in the mansion-house and hold it, under the law, until dower was assigned. Besides; although the mansion-house entered into was the mansion-house at the date of the will, and, consequently, the one intended in the will, *non constat*, for it is not averred nor stated, that it was the mansion-house at the time of the death of the testator; and, if not, the wife could not have *entered* upon it *except under* the will: she could not have remained therein under the law.

This objection, and several others of similar character, if there was otherwise any thing in them, would stand interdicted by the effect of the special demurrer filed in this cause.

Another objection is taken, however, by the Judge who has preceded me, which was not taken at the bar; namely, that the *County* in which the jointure-lands lie is not stated in the plea. This objection may be considered in two points of view: 1st. That the plea is alleged to be defective in not laying a *venue;* and, 2d. In not having that particularity and certainty which the law requires a plea to have. As to this last view of the plea; while it is readily conceded that a demurrer admits the truth of such pleas only as are properly pleaded, (bearing in mind at the same time the effect resulting as to this point from a *special* demurrer,) it is a rule equally true that a plea need only contain a reasonable certainty of time, place and persons.(*a*) It seems also to be a just rule on this subject, that less particularity is necessary in relation to matters which equally lie within the knowledge of the *adverse* party, than in relation to such as lie only within the knowledge of the party pleading. The plea before us stands justified by both these rules of construction. The locality and certainty of the jointure-land must have been at least as well known to the wife as to the tenant. Independent of this consideration, the plea, in respect of certainty, is entirely sufficient: it has every *datum*, whence to acquire a precise knowledge of the identity of the land, except the name of the County or Corporation in which the land lies. It is confined to land devised by a will of *Nov.* 19th, 1792; and is further ascertained by being described as the mansion-house, &c. in which the testator THEN lived. I will ask *cui bono* insert the *County* on the ground of *certainty?* Even then we must resort to the above *criteria* to ascertain the land in question; for there may have been more than one mansion-house within a given County or Town: on the other hand, this plea referring to the mansion-house in which the testator lived

(*a*) 3 *Bl. Com.* 308.

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on the 19th of Nov. 1792, affords an unerring standard. There is no want of *certainty* therefore in this plea.

With respect to laying a *venue* in this plea, there was no necessity for it. In *England*, as all writs emanate from the Court of Chancery, and the kingdom is divided into Counties, it is necessary to lay a *venue* directed to the Sheriff of the County in which the injury is supposed to have been committed; and then the trial must be had in the County in which the *venue* is laid.(*a*) I mean not to say at present (as being unnecessary) how far this doctrine of *venue* is applicable to this country, owing to the different organization of our Courts: but having remarked the above as the true ground of the doctrine on this subject, I will test this case by it, on a supposition that we were now in *England*.

(*a*) 3 *Bl. Com.* 273. 294.

In that country it is held that the laying a *venue* is sometimes *substantial* and sometimes *formal* only. It is *substantial* when the action is *in rem*, as in ejectment; for there the Sheriff must deliver possession, which he could not do unless the *venue* was laid in the proper County: but it is only *formal* where the action is transitory; but yet *some* County must be laid to which the process must go to bring a Jury from. And this *formal* idea of a *venue* is carried so far as even to justify a *fiction;* as where a bond on the face of it was made at *Bengal*, it must be stated to have been made at some place in *England* under a *videlicet*. These points are laid down with great force and perspicuity in the case of *Mostyn* v. *Fabrigas*.(*b*) I infer from this that a *venue* is not a matter of substance, unless the cause of controversy be *local;* unless the proceeding be *in rem;* in which case also the *real* County is to be laid. This doctrine would shew the necessity of a *venue* in the action for the dower; for it is local, and the Sheriff is to deliver possession of the land: but, in relation to the *jointure*-land, *that* would *equally* bar dower, if *it* lay in another country. In that case, if its locality were mentioned, t need only be mentioned, by a fiction, to be in *Virginia*. As the suit in question is not to recover the

(*b*) *Cowp.* 176.

jointure-land, but the dower-land, and the question concerning the former comes in only collaterally, if a *venue* were necessary in relation to it, which it is not, it would be merely of the *formal* and not of the *substantial* kind. In *Ilderton* v. *Ilderton*,(*a*) in a replication to a plea of *ne unques accouple*, in a suit for dower alleging a marriage in *Scotland*, it was held not to be necessary to state by way of *venue*, *even by a fiction*, that the marriage was held in *England*. The best reason given for it is, that the Court had already possession of the cause, and this matter arose incidentally; and that the want of it could not be taken advantage of *even on a special demurrer*.

(*a*) 2 *H. Bl. Rep.* 145.

By the statute of 16 *Car.* II.(*b*) the want of a *venue* is aided after verdict. This shews it is not matter of *substance*; for we have often held here (as I have before said) that a want of substance going to the cause of action is not cured by a verdict, although the matter thereof must of necessity have been given in evidence to the Jury.

(*b*) See 7 *Bac. Abr.* 49.

By the same statute, c. 8.(*c*) it is enacted, *inter alia*, that the "want of a right *venue*," and all "such omissions, "variances and defects, and other matters of a *like* nature, "*not being against the right of the matter of the suit*, "shall be amended after verdict." This is an express legislative declaration that the want of a *venue* does not go to the very right of the cause.

(*c*) See 1 *Bac.* 150. and *Buller's N. P.* 324.

When to this we *add*, that by our act we are not to regard any defect or imperfection in a plea, other than what shall be specially alleged as causes of demurrer, unless something, so essential to the defence as that judgment, according to law, and the very right of the cause, cannot be given, shall be omitted,(*d*) the want of a *venue* (a mere *formal* matter in a case like the present, even in *England*) must not impede a judgment.

(*d*) *Rev. Code*, vol. 1. c. 112. s. 27.

The statute of 4 *Ann.* c. 16.(*e*) in *England*, (which is not stronger than ours as to the point in question, and from which our act was taken,) expressly overrules defects not stated as causes of demurrer, "notwithstanding such defect "or omission might heretofore be taken to be *matter of*

(*e*) See 1 *Bac.* 151.

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"*substance.*" If, therefore, this want of a *venue* had, before our act, been held to be a matter of substance, *non constat* that it would prevail since the enaction of the statute.

On every ground, therefore, I am of opinion that there was no necessity for laying a *venue* in the plea in question; and, if there was, the omission to do it is not such a matter of *substance* as to justify the demurrer; since it was not set down as one of the causes thereof.

My opinion is to sustain the plea, overrule the demurrer, and affirm the judgment; and not, by sustaining the demurrer, to give the demandants the land if they shall, on the first plea, be able to shew that the testator was *seised* of the land sued for during the coverture. In that case, when we consider that a jointure was made by the testator, and accepted by the appellant after the coverture, the judgment would not only give a double provision to the widow, but be equally reprobated by the justice of the case and the law of the land.

Judge FLEMING. The principal question in this case is, whether the Court below erred in overruling the demurrer to the defendant's second plea, or whether that plea, in the form it appears on the record, was not, if sustained, a legal bar to the demandant's action?

In considering the question, I shall briefly state so much of the plea as seems to be material; and, secondly, state the substance of the demurrer, and endeavour to apply the law to the case, as it appears on the record.

The plea is, that the said *John H. Norton*, by will, duly made, &c. devised that the said *Catharine*, his wife, should have the full use of the mansion-house, and other houses of the said *John*, *where he did then live*; together with the ground on which they stand; and the garden, stable and stable-lot, *during the life of the said Catharine*, (and then mentions two codicils to the said will, by which a considerable personal estate was bequeathed to her,)

"which said will, and the codicils annexed thereto, have "since the death of the said *John*, been duly proved and "recorded, in the Court of *Frederick* County, and are "now in full force; and that the devises, &c. in the said "will and codicils, before set forth, *were in lieu of the* "*said Catharine's dower in the estate of the said John;* "and that the said *Catharine* did, after the death of the said "*John*, and before the commencement of this suit, ac- "tually enter *into* and occupy the said mansion-house, and "other houses *where the said John did live*, and the stable, "stable-lot and garden, so as aforesaid devised to her, in "lieu of her dower aforesaid."

To this plea there is a special demurrer; and for causes thereof, the demandants shew, 1st. "That the averment in "the said plea is matter not contained in the said will and "codicils, or either of them, or any part thereof; and the "tenant ought not to aver any thing out of the said will "and codicils.

2d. "The averment aforesaid is respecting matter of "record, and ought to be verified by the record, and is "not so verified by the said plea."

1st. With respect to the first cause of demurrer, it was formerly held that a jointure by *deed*, though not expressed to be in lieu of dower, might be *averred* to be so;(*a*) but that a *devise* to a wife for life, cannot be averred to be in satisfaction of *dower*, unless it be so expressed in the will.(*b*) Because, say the books, it shall be considered as a kindness and benevolence of the testator.

(*a*) *Co. Litt.* 36. b. 4 *Rep.* 3.

(*b*) *Co. Litt.* 36. b. 4 *Co.* 4. *Leake* and *Randall's* case.

But our act of Assembly, "*reducing into one the seve-* "*ral acts relating to dower.*" passed the 6th *Dec.* 1792, places the provision made for the wife, by *deed*, or by *will*, on the same ground; in which it is enacted (section 11.) that, "if any estate be conveyed by *deed*, or by *will*, either "expressly, or by *averment*, for the jointure of the wife, in "lieu of her dower, to take effect in her own possession, "immediately on the death of her husband, and to con- "tinue during her life, at least, determinable by such acts

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" only as would forfeit her dower at common law, such " conveyance shall bar her dower of the residue of the " lands, tenements and hereditaments, which at any time " were her said husband's. But, if the said conveyance " were before the marriage, and during the infancy of the " *feme*; or if it were made after marriage, in either case, " the widow may, at her election, waive such jointure, and " demand her dower." And in the 12th section, it is enacted, that, " when any conveyance, intended to be in lieu " of dower, shall, through any defect, fail to be a legal bar " thereto, and the widow, availing herself of such defect, " shall demand her dower, the estate and interest conveyed " to such widow, with intention to bar her dower, shall " thereupon cease and determine."

By this act, it appears to be the will of the Legislature, that a widow shall not have both jointure and dower, whether the former be by *deed* or by *will*; but, in certain cases, may make her election.

The first recited section shews, clearly, that where a testator, by his *will*, makes provision for his widow, intending (but not expressing or declaring) it to be in lieu of her dower, the proper and only mode of shewing it to have been so, is by *averment*; and therefore the *averment* in the case before us, that the devises in the will of *John H. Norton*, to his widow, were in lieu of her dower, was proper, and no good cause of *demurrer*; and the same answer may suffice for the second cause, " that the averment " aforesaid is respecting matter of record, and ought to be " verified by the record, and is not so verified;" for it seems to me not necessary that the averment should have been verified by the record; the will, in which the devises averred to be in lieu of her dower were made, being particularly referred to in the plea.

But it is contended, that the plea is faulty and cannot be supported, because there is no *venue* laid therein; and it is not stated that the mansion-house, &c. are situate in the

town of *Winchester* and County of *Frederick*, or at any other particular place.

If we inquire into the reason why laying a *venue* is necessary, in pleadings, where the subject in controversy is local, I conceive it to be, to identify the subject, and to prevent surprise on the adverse party; and it seems necessary on the part of the demandant also, that in case of a recovery, process may issue to the proper officer to give possession of the premises.

If I am correct in this position, the object is fully attained by the plea, in this case; in which it is stated, "that the mansion-house, &c. devised to the said *Catha-* "*rine*, during her life in lieu of her right of dower, in the estate of the said *John*, is the mansion-house, &c. "where the said *John* did *then* live, and that, after the "death of the said *John*, and before the commencement of "this suit, the said *Catharine* did actually enter into and "occupy the said mansion-house, &c. where the said *John* "did live, and hath ever since been in the possession and "occupation thereof, in lieu of her dower aforesaid." The plea refers to the will of *John H. Norton*, "*proved* "*and recorded in the Court of Frederick County;*" and, as the law directs, that if wills be proved in a County Court, the proof shall be in the Court of the County wherein the mansion-house, or place of residence of the testator is, it consequently follows that the mansion-house of *John H. Norton* was in the County of *Frederick*, though not stated to be in the Town of *Winchester*, which appears to me to be as complete a description of the mansion-house, garden, stable and stable-lots, as if he had added, "lying in the "Town of *Winchester*," which I consider as matter of *form* merely, the *substance* having been sufficiently stated in the plea, in which the premises were so particularly described, that the demandants could not, I conceive, have possibly mistaken their identity; and I am the more confirmed in this opinion, as neither the counsel below, in the *demurrer*, nor the able counsel in the argument at this bar,

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took the smallest notice of the omission. And, in my apprehension, the plea tendered a fair issue to the demandants, on which they might have tried the cause on its true merits, and the *onus probandi* would have been on the defendant.

But, admitting that the omission would have been fatal, had it been alleged as a cause of demurrer, it is now too late to make the objection; for, by the act for limitation of actions, &c. passed the 19th *Dec.* 1792, section 27. it is enacted, "that where a demurrer shall be joined in any action, the Court shall not regard any other defect, or imperfection in the *writ*, *return*, *declaration* or *pleading*, than what shall be specially alleged in the demurrer, as causes thereof; unless something so essential to the action, or defence, as that judgment according to law and the very right of the cause, cannot be given, shall be omitted."

The question then occurs, whether there is not sufficient matter stated in the record to enable the Court to give judgment according to law, and the very right of the cause? and I have no difficulty in saying, that I am of opinion there is. The demurrer, I conceive, admits the fact, that the demandant *Catharine*, under the devise aforesaid, entered into and occupied the mansion-house, garden, stable and stable-lot, &c. and hath ever since been in the possession thereof; but denies it to be in lieu of her dower; and that the defendant ought not so to have averred it, in his said plea, as it is matter not contained in the said will and codicils, or either of them, or any part thereof.

By the act of Assembly, relating to dower, above recited, a widow shall not have both dower and lands intended to be in lieu thereof; and the demandant *Catharine*, having accepted and occupied the lands, mansion-house, &c. (wherever they be,) devised to her by her late husband's will, is not entitled to dower in any other of his lands or tenements; as it appears to me that they were intended

to be in lieu of her dower, though not so expressed in the will. I am therefore of opinion that the judgment of the District Court ought to be affirmed.

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By a majority of the Court, (absent Judge LYONS,) the judgment of the District Court AFFIRMED.

Nimmo's Executor *against* The Commonwealth.

Monday, 8th May, 1809.

AT a General Court holden on the 26th day of *April*, 1786, the Commonwealth obtained a judgment against *William Nimmo*, Sheriff of *Princess Anne* County, for 208*l.* 10*s.* 4*d.* for the balance of the one *per cent.* tax on land, collected by him for the year 1784, and 31*l.* 5*s.* 6 1-2*d.* for damages thereon, according to law, amounting in the

1. An executor must, at his peril, take notice of a judgment against his testator, in what Court soever it may have been rendered; and if he exhaust the assets by paying debts of inferior dignity, must satisfy such judgment *de bonis propriis.*

2. The *English* maxim, that "*nullum tempus occurrit regi*," has been adopted in *Virginia*, in relation to the Commonwealth; on which principle it has been held, that the acts of limitations do not extend to the Commonwealth, in civil suits, not founded on any *penal* act expressly limiting the commencement of the action.

3. No length of time can bar the Commonwealth from *execution* on a judgment in its favour, nor even render it necessary to sue out a *scire facias* to entitle it to such execution.

4. Executors and administrators ought to be allowed, in their accounts, all *reasonable charges and disbursements* for the benefit of the estate they represent; and a *reasonable recompense for their personal trouble*, in preference to the claim of any creditor of the decedent. The Commonwealth's taxes on the property of the decedent, the expense of recovering a runaway negro whose value is credited to the estate, money paid for the hire of a slave (hired by the executor or administrator) to make a crop on the land of the decedent, under the care of the executor or administrator, the proceeds of such crop being credited to the estate, are *reasonable charges and disbursements.*

5. The proceeds of the sale of land, directed by the will of the testator to be sold for the payment of his debts, are *equitable assets*, and should be distributed among *all* the creditors *pari passu;* nor are such assets proper subjects for the cognisance of a Court of Law.

6. *It seems*, that charges appearing to be just and legal, in an *ex parte* settlement of an administration account, by commissioners appointed by the Court which granted the administration, and passed by such Court, (the commissioners having reported, that vouchers were produced to justify such charges,) are to be received, *prima facie*, as evidence in favour of the executor or administrator; and that the burthen of proof lies on the party who would impugn them.

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whole to 239*l.* 15*s.* 10 1-2*d.* with interest thereon from the 10th day of *Nov.* 1784, until payment, and costs. On the 12th day of *July*, 1799, a *scire facias* issued upon the said judgment against *James Nimmo*, his surviving executor, who appeared and pleaded "payment by the testator and "fully administered;" to which the Attorney-General replied generally. On the trial of these issues, which took place *June* 13th, 1804, the Jury found against the plea of *payment;* and also that the defendant had goods and chattels of his testator unadministered to the amount of 263*l.* 1*s.* 8*d.* a bill of exceptions to certain opinions of the Court having been signed and sealed, stating that the defendant to support his pleas gave in evidence an account of his administration, settled by commissioners appointed by *Princess Anne* Court, and admitted to record, *May* 5th, 1800, shewing a balance in his hands of 27*l.* 1*s.* 1 1-4*d.* (the items on the *debit* side of which account consisted of funeral charges, taxes paid the sheriff, "cash paid *D.* "*Brown*, for his trouble, &c. about negro *Sancho*, 13*l.* "cash paid *William Plume* for leather, 1*l.* 17*s.* 0 3-4*d.* do. "paid *A. Walke* for negro hire, 12*l.* 8*s.*" sundry payments of debts to bond and simple contract creditors; and 15*l.* 4*s.* 9*d.* for the executor's commissions; on the credit side the estate was credited "by cash of Maj. *William Tishburn*, "of *Charleston*, by the hands of Mr. *James Douglass* for "negro *Sancho* who went off with the *British*, 83*l.* 18*s.* "by amount of a balance of account against Col. *William* "*Robinson*, 5*l.* 16*s.* by the amount of sales of one hundred "and twenty-six acres of land left by the will to be sold, "at 30*s. per* acre, 189*l.*" and by sundry sales of personal property specified; the credits amounting altogether to 304*l.* 16*s.*) "whereupon the Attorney-General gave in "evidence an inventory of the estate of the said *William* "*Nimmo*, signed by the defendant himself;" (corresponding exactly with the credit side of the above-mentioned account;) and the following memorandum annexed thereto; "Memorandum, the other personal estate of the "above-named *William Nimmo*, including his slaves, was

"sold in his life-time under a *venditioni exponas* issued "from the office of the General Court, at the instance of "the Commonwealth, and a return thereof made by the "Sheriff of *Princess Anne*," "*James Nimmo*, executor "of *William Nimmo*;" "and moved the Court to instruct "the Jury that no discount or credit ought to be allowed "the defendant for any item in his aforesaid account of "administration, except for the funeral expenses and "; alleging it appeared from the said in-"ventory that the defendant had notice of the judgment "in the said *scire facias* mentioned before the making of "the disbursements in the said account mentioned; and "alleging also that the Commonwealth was not bound by "the statute limiting the emanation of writs of *scire fa-*"*cias*; whereupon the Court did instruct the Jury that "the defendant was not, in this action, by law, entitled to "any credit or discount for the items excepted to as afore-"said by the Attorney-General; to which opinion the de-"fendant excepted," &c.

The judgment was that the Commonwealth might have execution against the defendant for the amount of the former judgment, "to be levied as to the said 263*l.* 1*s.* 8*d.* "of the goods and chattels of the testator in the hands of "the defendant to be administered, if so much thereof be "had, but if not, then the costs to be levied of his own "proper goods and chattels."

To this judgment the defendant obtained a *supersedeas* from a Judge of the Court of Appeals; assigning in his petition, the following errors; viz.

1. "That the Commonwealth is bound by the statute "of limitations; that the *scire facias* is therefore barred; "and that it was the duty of the General Court to declare "it to be untenable; the notice alleged not being *proved*; "or, *if proved*, not preventing the operation of the said "statute."

2. "That the taxes paid to the sheriff of *Princess Anne* "for the property of the estate were properly paid; be-

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" cause otherwise the Sheriff might have seized and sold " the property itself."

3. " That the sum of 189*l.* arising from the sale of the " land directed by the will to be sold, was only *equitable* " assets; and, as such, distributable *pari passu* among all " the creditors of the testator, and therefore not to be ap- " propriated to the Commonwealth alone."

4. " That, if the land were even legal assets, the bond " debts were entitled to a share, since the original judg- " ment against *William Nimmo*, was prior to the act of As- " sembly specially subjecting lands to the judgments of the " Commonwealth; and, upon the principle adjudged in the " case of *Eppes* v. *Randolph*, by the Court of Appeals, the " *lien* by *elegit* has been lost from neglect."

5. " That, by the decision of the Court, the very com- " missions of the executor are rejected, after having been " allowed by the Court of the County of *Princess Anne*."

6. " That the *debit* for cash paid to *D. Brown*, '*about* " '*negro Sancho*,' whether it related to the pursuit of him, " cure of him, or any other necessary purpose concerning " him, was justly chargeable to the estate, in preference " to the demand of the Commonwealth; because that " *debit* was incurred for the safety of the property itself."

7. " That the money paid to *William Plume* was for a " necessary expense of the estate; and,

8. " That the negro hire of 12*l.* 8*s.* was also a current " expense of the executor, while in the management of " the estate; it being a clear principle, that a creditor can- " not claim more than the surplus of an estate after de- " fraying ordinary expenses."

The petitioner " moreover conceived it just, that, after " his accounts had been approved by the usual tribunal for " more than four years, and his vouchers surrendered, and " perhaps destroyed, every item therein which can, under " any circumstances, be supposed admissible in preference " to the Commonwealth, ought to be presumed to be so, " and have a preference accordingly."

Randolph, for the plaintiff in error, said, that the Court ought not to have given a general opinion that the credits were not to be allowed; because that was a matter of fact depending on the weight of testimony, of which "the Jury, "and not the Court, are exclusively and uncontrollably "the judges."(*a*) In support of the first point in the petition, he urged the hardship of the doctrine, that a dormant judgment may be kept up without notice to an executor, and that, if he exhausts the assets in paying debts by specialty, he shall be compelled to satisfy the judgment out of his own pocket; and contended that this *scire facias* was barred by the statute of limitations; relying on the terms of the act,(*b*) as sufficiently general to extend to judgments on behalf of the Commonwealth, and to judgments then in existence, as well as to those of subsequent date. If the 47th section of the same act(*c*) prevents it from extending to any *right* which had accrued prior to its commencement, we must inquire, whether prior thereto the Commonwealth had a right of exemption from *all time*. The act of 1778, c. 2. s. 4.(*d*) did not retain this privilege as to judgments afterwards obtained in the name of the *Commonwealth*, but only as to judgments then existing in the name of the *King*. Neither reason nor the words of the law are in favour of any other interpretation. The clause in the fourth section applies only to the executions described in the preceding sections, as much as if the words "in cases aforesaid" had been inserted; and because it was so considered, it has not been transplanted into any succeeding revisal. The word "*but*" (with which that clause commences) is antithetical, and confirms this construction.

(*a*) 1 *Wash.* 90. *Ross* v. *Gill.*

(*b*) *Rev. Code*, vol. 1. c. 76. s. 5. p. 108.

(*c*) *Ibid.* 113.

(*d*) *Ch. Rev.* p. 81.

A broader error was never seen than was committed by the General Court in this case. They refused the executor a credit for money paid for *taxes!* What a solecism is it that the Commonwealth's claim for *taxes* is not good against the Commonwealth's claim by *judgment?* Taxes are a debt of the *first* dignity. Those very taxes were

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paid for support of the plantation, the profits whereof have been charged to the executor. A negro too has been charged against him; yet the expense of apprehending that negro is disallowed. The produce of the estate is charged, yet necessary disbursements for raising that produce are disallowed! In short, no credit is given the executor but for funeral expenses!

Another point is important. The act subjecting lands to satisfy the Commonwealth's judgments was not in force when this judgment was rendered.(a) No lien was therefore given to the Commonwealth in preference to other creditors. Of course the sum of 189*l.* received for land sold, being equitable assets, ought to be divided among all the creditors *pari passu*.

(a) See *Rev. Code*, vol. 1. p. 135, 136. Acts of 1789, c. 40.

The Attorney-General, for the Commonwealth. The first point I will consider is that of the act of limitations. As to the general principle, it was settled in *Kemp* v. *The Commonwealth*.(b) The expression in the act of 1778 is general, that "no time shall bar the Commonwealth of "*execution*," not of *such executions* as had been mentioned. The sixth section of the act of 1792(c) evidently shews that the fifth section was intended to apply exclusively to *individuals*, and not to the Commonwealth, which can neither be a *feme covert*, *non compos mentis*, nor come within any other exception therein mentioned. That act moreover does not apply to any judgment of a prior date. In the cases of *Turner* v. *Turner*,(d) and *Elliott* v. *Lyell*,(e) it was decided that an act of Assembly had not a retrospective effect.

(b) 1 *Hen. & Munf.* 85.

(c) *Rev. Code*, vol. 1. p. 108.

(d) 1 *Wash.* 139.

(e) 3 *Call*, 268.

With respect to the question of notice, there is no authority that judgments must be revived by *scire facias* before the executor is bound to take notice of them. It is true that the judgment creditor who first sues out his *scire facias* is to be preferred;(f) but this does not contravene the general rule, that an executor is bound to take notice of judgments as against debts of inferior dignity.(g)

(f) *Toller*, 207.

(g) *Toller*, 210, 211.

But we need not rely on *constructive* notice; for in this case, *actual* notice appears from the facts disclosed. The executor ought to have traced the subject, and ascertained whether there was not a balance due to the Commonwealth, since he knew his testator was a delinquent Sheriff, and that part of his property had been sold by a *venditioni exponas*.

Again; Debts due to the *Crown* are of the highest dignity;(*a*) and it was clearly the intention of our Constitution to retain to the *Commonwealth* all such prerogatives of the King as were necessary to the public interests. The reason of such prerogatives applies to all governments, and as well to the state of things *after* as *before* the revolution. As to *taxes*, I admit the Commonwealth ought not to be satisfied twice: but whether the party might not recover back these taxes is another question. If they were due in the life-time of the testator, they were due by open account. Whether such was the case, or not, does not appear; nor whether the expense of apprehending the negro *Sancho* was incurred before the death of the testator or not; and, indeed, there is no evidence that any of the items were such as the executor had a right to pay.

(*a*) *Toller*, 201.

It is extremely doubtful whether the proceeds of the sale of land were *equitable* assets. They seem rather to be considered as *legal* assets. According to 2 *Fonb.* 397.(*b*) "legal assets, though you cannot come at them without the "assistance of equity, shall be applied in a course of ad-"ministration." Nothing appears in this case to make the executor a *trustee*. He seems to have considered himself as taking the property *qua* executor, and not as trustee; for he charges himself with it, as executor, and as legal assets.

(*b*) Book 4. c. 2. s. 1.

The Court in this case did not give an instruction as to the weight of evidence. The Jury, I admit, are to judge of facts; but when facts are ascertained, the Court determines the law. All the Court has done here is to instruct the Jury as to the law in case they should find a certain state of facts to exist.

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Randolph, in reply. Independently of the act of limitations, the *scire facias* was improperly issued; for, after ten years, it could not issue without special leave of the Court. In the case of *Kemp* v. *The Commonwealth*, a number of points were made in the argument; but a general opinion was given by the Court without assigning any reason. The true ground of the decision was, that there was a *trust* in that case. Is there any trust in this?

The rule, that *general* expressions are to be considered relatively to the subject matter, should be applied in construing the act of 1778, so as to limit the word "*execution*" to the executions there spoken of. The argument, that the Commonwealth is not a *feme covert*, &c. proves nothing; for shewing that the Commonwealth cannot come within the *exceptions* of the act does not shew that the *general* terms of the act do not apply to it.

According to the doctrine now contended for, thirteen years after an executor has settled up his account, he may be again called to settle every item. The court precluded us from giving any evidence about any item, by instructing the Jury not to take notice of them at all.

Lord *Thurlow*, in *Brown's Ch. Rep.*(1) ridicules the distinction between taking *qua executor*, and as *trustee*. According to all the modern authorities, the proceeds of lands devised to be sold for the payment of debts generally, are in every instance, *equitable* assets.

Take out of the 304*l.* 16*s.* the amount of the sale of land, and the expense of reclaiming the negro who ran away, together with the taxes, and other money expended for the benefit of the estate, and the balance is very small.

Judge TUCKER. If a man hires a negro for a year, and dies before the end of the year, do you contend that the debt for *hire* is preferable to a judgment?

(1) Note by the Reporters.

See on this subject, *Toller*, 329, 330. 1 *Bro. Ch. Rep. Appendix*, 6. *Hargrave* v. *Tindal*. 2 *Bro. Ch. Rep.* 94. *Batson* v. *Lindegreene*, 2 *Fonb.* 3d ed. 397 and 398. note (*d*).

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Judge *Blackstone*. (2 *Comm.* 511.) It would seem from this, that the rule is in some respects a statutory one; it must however be acknowledged that it was also a rule of the common law; to that effect is *Cro. Eliz.* 793. and *Godolphin*, in his *Orphan's Legacy*, 170. is so likewise; though in 2 *And.* 159. the Court thought that an executor ought not to be charged with a judgment of which he had no notice.(*a*) But it is not every common law rule, founded upon the judicial system of that country, that can be deemed, in strictness, applicable to the circumstances and situation of this. In *England* there are only four Superior Courts of Record, all held at the same place, and their records accessible to every one who chooses to consult them. A regular train of attorneys, and officers belonging to these courts, and well versed in every thing that relates to them, are capable in a few hours of furnishing that information respecting matters of record, which might defy a life of research in this. In this country we have now two hundred Courts of Record; the records transferred from one place to another in various instances; and the very names of some Counties in which Courts have formerly been held sunk in oblivion. There was once a County in *Virginia* called *Rappahannock* County, and another called *Yohogania*: there are no such Counties at this day.(*b*) Can it be supposed, that under such circumstances, (even if the rule of the common law in *England* be such as above supposed,) an executor must at his peril take notice of all judgments against his testator in his life-time, in what Court, or part of the state soever, the same may have been entered? I conceive not; for, if such a principle be established as law, no man will ever be an executor.

(*a*) *Per Lawrence*, J. 6 *T. R.* 388. *Hickey* v. *Hayter*.

(*b*) *Vide* Acts of 1785, c. 69.

But, while I reject the application of the rule to *all* judgments, I think it reasonably and justly applies to some. An executor may well be presumed capable of informing himself of judgments obtained against his testator in the County or District Court within whose jurisdiction he resided, and to whose process he was daily amenable. So, as to judgments in the General Court, which has ju-

risdiction over the whole Commonwealth in respect to public agents and defaulters. If a testator has been a public collector of taxes, this, of itself, is a sufficient warning to an executor, to inquire whether any judgment hath been obtained against him as a delinquent. And, if there be, it will be difficult to excuse his neglect in making the inquiry. But, in the present case, the judgment was nearly of five years standing before the testator's death. His whole visible personal property, except a few trifling articles of household furniture, valued at 26*l.* only, had been taken and sold upon an execution, issued in behalf of the Commonwealth. The executor might have concluded the debt satisfied, under such circumstances; especially if the agents of the Commonwealth had taken no steps to recover the balance, by an execution against the body of the testator, or had not given the executor actual notice that a balance still remained due. The great lapse of time (on which I lay great stress) between the judgment in *April*, 1786, and the testator's death, in *January*, 1791, united with the circumstances just noticed, and the liability of a Sheriff's securities to make good any deficiency, prompt me to say, that unless notice of that judgment were proved to have been given to the executor, he ought not to be charged as for a *devastavit* in paying other just debts of his testator, merely on account of the notice which the law *implies* in such cases. For the reason of the law seems to be this: "that the judgments of all courts, upon matters "or persons within their jurisdiction, are conclusive, *so* "*long as they are in* FORCE; and the parties are bound to "yield obedience to them; and that obligation to perform "follows the assets in the hands of the executor or adminis-"trator."(*a*) Now, although a judgment may be *enforced*, either by a *capias ad satisfaciendum*, *fieri facias*, or *elegit*, WITHIN *the year*, yet AFTER that period the judgment creditor cannot *enforce* his judgment, even against the testator himself, if living, without *notice by scire facias*. And it seems strange that an executor should thereafter be bound at his peril, to take notice of that of which his

(*a*) See Ld. Ch. *Talbot*, *Forest*. 222.

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testator must *receive notice*, before he could be charged upon the judgment formerly obtained against him. If dormant judgments will not bind a *purchaser* without notice,(*a*) wherefore should they bind an *executor* without notice?

(*a*) 2 *Call*, 187. *Eppes*, &c. v. *Randolph.*

Another error suggested is, that the sum of 189*l.* arising from the sale of the land directed by the testator's will to be sold, was only equitable assets; and as such, distributable *pari passu* among all the creditors. The rule certainly is, that in administering legal assets the Court follows the law; but as to equitable assets it proceeds by the rule of equality, 4 *Bro. Ch.* 171. *Lowthian* v. *Hassel.* And in that case the Court refused to compel a creditor, who had by diligence obtained payment of one bond out of five, to bring the money received for that bond, into contribution. I am also of opinion, that the judgment having run out of date, ceased to be a lien upon the lands, until revived by *scire facias*, according to the decision of *Eppes* v. *Randolph.*(*b*) The act making Sheriff's lands liable to the Commonwealth's judgments, did not pass until eighteen months after the judgment in this case.(*c*) With respect to this 189*l.* I conceive the General Court ought totally to disregard it, as not being legal assets; leaving it to the Commonwealth to pursue its remedy for a due proportion thereof, as the Attorney-General may be advised.

(*b*) 2 *Call*, 186.

(*c*) 1787, c. 40.

We come now to that instruction of the Court to the Jury, directing that no discount, or credit, ought to be allowed the defendant for *any item* in his administration account, except for the funeral expenses. Such certainly is the rule laid down by Lord Ch. J. *Holt*, 1 *Salk.* 296. Our law is however more liberal; executors are to be allowed "*all reasonable charges and disbursements*, which they shall "lay out and expend in the funeral of the deceased, *and other* "*their administration;*" such, for example, as may be incurred in consequence of the provisions contained in the 46th section of the act concerning wills, which in certain cases give him the charge and care of the whole estate, real and

personal, for a certain period; and the same rule will hold, where a testator directs his estate *to be kept together* for a longer period. Our law also allows a compensation in nature of commissions to be made to executors, which I think the practice in *England* does not. On this point, therefore, I have no doubt that the instruction of the Court was not altogether correct. I am therefore of opinion, that the judgment be reversed, and the cause sent back, with directions *pursuant* to the preceding opinion.

Judge ROANE. This was a *scire facias* issued on behalf of the Commonwealth, from the office of the General Court, on the 12th of *July*, 1799, against *James Nimmo*, surviving executor of *William Nimmo*, deceased. Its object was to enable the Commonwealth to have the effect of a judgment obtained against *William Nimmo*, the testator, in the *General Court*, on the 26th of *April*, 1786, for 208*l.* 10*s.* 4*d.* the balance of the one *per cent.* tax, *collected* by the defendant in the County of *Princess Anne*, for the year 1784, and 31*l.* 5*s.* 6 1-2*d.* damages; amounting in the whole to 239*l.* 15*s.* 10 1-2*d.* with interest and costs, as in the said writ of *scire facias* is more particularly mentioned.

The appellant, (the executor,) having appeared, pleaded, 1st. Payment by the testator; and, 2d. Fully administered; on both which pleas issue was joined. The Jury on the trial found *against* the defendant on the first plea; and, on the second, found that the defendant, at the time of issuing the *scire facias*, had divers goods and chattels, which were of the testator at the time of his death, in his hands to be administered, to the value of 263*l.* 1*s.* 8*d.* *parcel* of the debt, damages and interest aforesaid wherewith he might have satisfied the same *pro tanto*; and judgment was given against him for the same, in the form usual in such cases. This finding of the Jury was under the influence of an opinion of the Court, stated in the bill of exceptions, and to be presently more particularly noticed.

The first inquiry which presents itself, is respecting the nature and character of this writ of *scire facias*; whether

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It is a *scire facias* to revive the judgment *because of* the lapse of ten years, or even of a year and a day since its rendition; or *because of* the death of the defendant, and the devolution of his interests upon his executor, who was no *party* to the original judgment. I rather think it is in this last view *only* that this *scire facias* is to be considered.

I will assign my reasons for this opinion. It is laid down in 6 *Bac. Abr.* 112. that one who is no party to the record or judgment, as heir, or executor, &c. though it be *within the year*, shall have no writ of execution to enable himself to the suit, and so of the tenant OR DEFENDANT; for the alteration of the person altereth the process. On this ground, then, of the death of the defendant, this writ of *scire facias* shall be taken to have issued, especially if, in truth, one was not necessary on any other ground. This brings us to that inquiry, and more particularly to the question whether the Commonwealth was barred of her execution by the lapse of time in the case before us. That inquiry again presents itself in a twofold point of view; 1st. Whether a *scire facias* be necessary, after the lapse of a year and a day, in the case of a judgment of the Commonwealth; and, 2d. If so, whether the right to sue out a *scire facias* is barred by the lapse of *ten years* under the act of 1792.

As to the first branch of this inquiry, it is held in 1 *Salk.* 603. that, *in case of the King*, there need not be any *scire facias* after the year and day: and it would seem that the declaration in the act of *October*, 1778, c. 2. "that no time "shall bar the Commonwealth of execution," has adopted this principle in relation to judgments of the Commonwealth. That act speaking of judgments in favour of the *King*, which did not require a *scire facias* after the year as aforesaid, it is reasonable to consider it as placing the Commonwealth in the same situation; as exempting the Commonwealth as well as the King from the necessity of suing out a *scire facias*. In opposition to this principle it is said, that the maxim "*nullum tempus occurrit regi*," which gives this rule in *England*, arises from the roya

prerogative, and is odious and inapplicable to the nature of our government. In answer to this objection it would seem that, while our Constitution inhibits to the "GOVERNOR the exercise of any power or prerogative, by "virtue of any law, statute, or custom of ENGLAND,"(a) it does not interdict such preferences and pre-eminences as may be given to the *Commonwealth* by the acts of our *own Legislature*. In this latter class, the aforesaid act of 1778 causes the present case to fall; and that circumstance supersedes the necessity of considering how far, on *general principles*, the maxim "*nullum tempus occurrit regi*" applies to this country. Whenever that point must, of necessity, be decided, it will be important to consider how far the decision in *Kemp* v. *The Commonwealth*,(b) and, also, what is said by the Court in the case of *Birch* v. *Alexander*,(c) have seemed to give a countenance to its application. I will merely say, at present, that within my observation, the Commonwealth is not in general, and from the nature of the case cannot be, on an equal footing with private suitors, in respect of diligence, attention, &c. (however vigilant and faithful its officers may be,) and that, therefore, the reason of this pre-eminence may be in some measure as applicable to the *present* government as to the *former*.

(a) *Constitution of Virginia, art.* 9.

(b) 1 *Hen. & Munf.* 85.

(c) 1 *Wash.* 34.

I leave that general question, however, for future decision. It is not necessary to be decided in this case; for here the Legislature has spoken explicitly on the subject in the aforesaid act of 1778. That act has never been repealed; it is founded, perhaps on good reason; is supported by the analogy, as to this point, of the doctrine in *England* as aforesaid; and therefore, neither the general limitation as to writs of *scire facias* provided by the act of 1792,(d) nor the common law limitation of a year and a day, does, I think, embrace the judgment in question.(1) The Com-

(d) *Rev. Code*, vol. 1. p. 108.

(1) Note by Judge ROANE.

Since this opinion was delivered, I have been informed by Mr *John Brown*, Clerk of this Court, that he has never known a *scire facias* to issue, on the

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monwealth, therefore, had a right to sue out the *scire facias* in this case, the lapse of time notwithstanding; and was entitled to recover, in satisfaction of its judgment, all such of the testator's assets as were not otherwise *legally* administered in favour of other creditors.

Having thus cleared the way for the consideration of the particular instruction of the Court, under which the verdict of the Jury was found, and which verdict can only stand in the event of that instruction being *correct*, let us examine the rectitude thereof.

The defendant, at the trial, having given in evidence, in support of his second plea, an account of his administration which had passed the Auditors of *Princess Anne* Court, on the 5th of *May*, 1800, who reported that *vouchers* were produced to them to sustain the charges in the account, leaving a balance of 27*l.* 1*s.* 1 1-4*d.* in the hands of the executor; the Attorney-General, on the part of the Commonwealth, gave in evidence to the Jury an inventory signed by the executor, (the items of which exactly correspond with those of the *credit side* of the account exhibited by the defendant,) with a memorandum thereon that "the "other personal estate of *William Nimmo*, including his "slaves, was sold in his life-time under a *venditioni expo-* "*nas*, issued from the office of the General Court, at the "instance of the Commonwealth, and a return thereof "made by the Sheriff of *Princess Anne*;" and moved the Court to instruct the Jury that no credit should be allowed the defendant for ANY *item* in his aforesaid account, except for *funeral expenses*; alleging that it appeared, from the memorandum aforesaid, that he had notice of the judgment aforesaid, before making the disbursements in the said account mentioned. The Court did accordingly in-

mere ground of the lapse of time, either under the royal or present government, in the case of executions in favour of the King or Commonwealth; but that the practice was to issue executions without such process, unless it was rendered necessary by the change of parties.

struct the Jury to the effect desired by the Atttorney-General; to which instruction the defendant excepted.

I am of opinion that this instruction was eminently erroneous in all those particulars (and for the reasons so luminously) stated in the *seven* last errors assigned in the petition for the *supersedeas*. I beg leave to refer to those reasons particularly; and to adopt them as the ground of my opinion on this part of the case. They had great weight with me at the time of awarding the *supersedeas*, and I understand are now all assented to by the *unanimous* opinion of the Court. Still, as those exceptions do not go to the *whole* of the items contained in the account; and, as the Commonwealth is not barred from recovering in this case on the merits, she is entitled to a judgment for the *residue* of the account; unless she be precluded on the ground stated by the Judge who has preceded me; that is, on the ground that the executor was not bound to take notice of the judgment on which the *scire facias* is founded. Between the rendition of the judgment against the testator and his death, *less* than FIVE years had elapsed, and that Judge seems to suppose that the executor had a right to *presume*, from such lapse of time, and because no *express* notice is shewn to have been given him of the existence of the judgment, that it was *paid*, and that consequently he was authorised to apply the assets to the payment of debts of *inferior* dignity.

I am not prepared to say that the *memorandum* before mentioned amounts, on account of its indefiniteness, to proof of *express* notice of THIS particular judgment; but this I am prepared to say, that this judgment, being rendered in the *General* Court, having at the time *general* jurisdiction throughout the Commonwealth, against a public collector; a Court having the peculiar jurisdiction in the fiscal concerns of the Commonwealth, and five years not having elapsed since its rendition; ought to have been taken notice of by the executor, *at his peril*, in the administration of the assets of the testator. I should suppose

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it would be readily admitted on all hands, that, within the year and day, the executor must have taken notice of it: but if, in respect of debts due to the Commonwealth, this limitation does not exist to bar the execution as aforesaid, this case cannot be differed from one in which that lapse of time had not occurred.

It is a universal rule that judgments and debts of record are to be preferred, in the administration, to simple contract debts, and that executors ought, *at their peril*, to take notice of them. In *Littleton* v. *Hibbins*,(a) which was *scire facias* v. executors, upon a *judgment* against the *testator* in debet; "they pleaded that, *before* "*they had any conusance* of this judgment, they had fully "administered all the assets in paying debts *upon obliga-* "*tions*; and thereupon it was demurred, and on argument "adjudged that it was *not any plea:* for that they *at their* "*peril* ought to take conusance of debts upon record, and "ought first of all (unless for debts due to the Queen "wherein she hath a prerogative) to satisfy *them*, and al- "though the recovery was in *another County* than where "the testator and executors inhabited, it is not material."

(a) *Cro. Eliz.* 793.

In *Ordway* v. *Godfrey*,(b) to a *scire facias* v. an administratrix to have execution of a judgment against her intestate, the plea was (in general) that she had no goods to be administered at the time of suing the writ, or afterwards; on demurrer, this was held to be no plea; for that "a "judgment cannot be answered *without another judgment*, "and it may be she had administered all the goods in pay- "ing *debts upon specialties*, which is not any administra- "tion to bar the plaintiff;" and "that she should have "pleaded specially how she had administered." This decision seems full up to our case; not only as to the point of the bar, but also as to the *generality* of the plea, which in that case was held to be insufficient. It is true that, in a *note* in 3 *Bac. Abr.* 80. referring to this case, (which has now perhaps become the general doctrine,) it is said, that the executor may, to the *scire facias*, plead *generally* that

(b) *Ibid.* 575.

he hath fully administered, without shewing that he did so in paying debts of as high a nature ; but yet that *that* must be "*proved upon the evidence*, else the trial will fall out "*against the executor.*"

In *Herbert's* case,(*a*) it is said by the Master of the Rolls, *inter alia*, " that executors shall be presumed to take " notice of *all judgments*, even in the *inferior Courts* of " Law, and therefore are not to pay bonds before such " judgments, *at their peril.*"

(*a*) 3 *P. Wms.* 117.

And, in a very late case, this doctrine is fully admitted ; with this exception, indeed, that the judgment, in order to have the preference, must be *docketed* according to the *English* statute of 4 and 5 *Wm. & Mary*, c. 20.(*b*) That decision, which was in favour of the administratrix, turned solely on the necessity of complying with the requisites of the statute in relation to docketing the judgments, which, otherwise, were thereby deprived of their preference : in other respects it entirely affirmed and admitted the doctrines I have been stating ; and, therefore, (as we have no such statute in this country,) the decision is full up to the point before us. The superadding the requisite of *docketing* judgments in *England*, *by the Legislature*, in order to enable executors the more easily to find them out and know of their existence, shews that the *hardship* of the case, in relation to the judgments of the County Courts, (to be presently more particularly noticed,) is improperly addressed to *this* tribunal.

(*b*) *Hickey v. Hayter*, 6 *T. R.* 384. *anno* 1795.

Testing our case by these decisions, it is incontestible, that the executor should have taken notice of the judgment mentioned in the *scire facias*, at his peril ; and that he should have *shewn in his plea*, or at least, *proved on the trial*, that he had applied the assets to the payment of debts of as high a dignity, or else there would be no bar ; neither of which has he done.

Thus stands the case as upon the *English* authorities. I will now refer to an opinion delivered in this Court, laying down the law on this subject with great precision and

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propriety. It is that of Judge FLEMING in the case of *Mayo* v. *Bentley*.(*a*) It applies exactly to the question now before us in all its parts, and overrules all the objections which have been taken on the ground of notice. This Court was divided on the main point in that case of *Mayo* v. *Bentley*; but there was no division whatever upon any principle or topic embraced by so much of that opinion as I shall now quote. I yield to the doctrine it contains my most decisive approbation.

(*a*) *Call's MS.*

In that case Judge FLEMING said, "In the general di-"vision of debts (after funeral and testamentary charges "are paid) there are three sorts; 1st. Debts by record; "2d. Debts by specialty; and, 3d. Debts by simple contract. "Passing by the cases in the *English* books respecting "debts due to the Crown, and those by recognisance and "statutes, let us consider such debts only, as are due from "citizen to citizen, and apply to the case now under con-"sideration. Debts *by judgment*, then, being *first in order*, "are to be *first paid*; and being debts of record, an exe-"cutor or administrator is bound to take notice of them "*at his peril, however distant the record may be* from his "residence: and in the present case there was a judgment "for 270*l.* against *Wm. Ronald in the County Court of* AC-"COMAC; and, had the administrator exhausted the assets "in paying debts of *inferior* dignity, he must have answer-"ed *it* (that judgment) out of his own estate." I shall leave this opinion to speak for itself: it is so apposite and emphatical that I can add nothing to it.

In the case of *Hopkirk* v. *Pendleton*, decided in the Federal Circuit Court of this State at the *last* term, and of which a gentleman of the bar has obligingly favoured me with a *note*, the facts were these: In the year 1772, *Spears, Bowman & Co.* (of whom *Hopkirk* is surviving partner) recovered a judgment against *Gunn*, in the County Court of *Henrico*; soon after which *Gunn* died, leaving *Pendleton* and others his executors, of whom *Pendleton* qualified and proceeded to administer the assets. In 1803,

Hopkirk brought debt on the said judgment; *Pendleton* pleaded *fully administered*, on which there was an issue. The Jury found a *special* verdict, in which they state the judgment of 1772; that the same had not been paid; and that *Pendleton* had fully administered the assets by paying debts due by specialties and simple contracts, and referred the law to the Court, as to the right of the plaintiffs to priority. Chief Justice MARSHALL decided that the defendant was bound *at his peril* to take notice of the *judgment*, and having paid debts of inferior dignity, they were no bar to the plaintiff's recovery. I shall make no comment on the application and appositeness of this decision to the case before us.

I have already remarked that the judgment in question was one of the *General Court;* a Court having at the time a jurisdiction (and especially in relation to fiscal concerns) coextensive with the limits of the Commonwealth. This case then steers clear of objections, as to this point of notice, in relation to judgments of merely LOCAL Courts. I am sensible that great hardships *may* exist in obliging an executor to notice the judgments of the numerous and *local* Courts of our country: but these hardships did not prevail with respect to the *lien* upon lands created by a judgment, although the objection was taken with great ability in the case of *Eppes* v. *Randolph*.(*a*) In that case a *lien* was supposed, though not decided, to be created by the judgment of *any* County Court in the Commonwealth; (due requisites in other respects being observed;) and *that* in relation to *land*, which is not the proper and *natural* fund for the payment of debts. It therefore goes beyond the case at bar, which only relates to *personal* property, the natural subject of administration. Neither did that argument of hardship prevail in either of the cases of *Mayo* v. *Bentley*, or *Hopkirk* v. *Pendleton*, in both of which it equally existed; and yet the general doctrine was adhered to. It is certainly not very *necessary* (as the judgment before us is a judgment of the GENERAL Court, and there-

(*a*) 2 *Call*, 125.

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fore not different, as to the point of notice, from the judgments of the Courts of *Westminster Hall* in *England*,) to consider the question in relation to the judgments of the *County* or other *local* Courts. But, I may be permitted to ask, (inasmuch as almost all our Courts have *now* become *local* in their jurisdiction,) if the objection now taken were to prevail, what would become of the rule of law, established time immemorial, giving *judgment debts* a preference? Would not such a construction *repeal* that rule? and is this a power proper for the *Courts of Justice* to exercise? It is true that a new *tier* of Courts has been lately created by the Legislature, making the number of these local tribunals perhaps amount to 200; but the *principle* is not changed thereby, but merely the *degree* of the hardship. I shall therefore adhere to the doctrine existing, time out of mind, in this country, giving to the judgments of the *County Courts* the same effect, in relation to the rights of creditors, as to those of the *General* Court: I should therefore have no hesitation to give to the judgments of *all* the Courts of Record in the Commonwealth, the same effect as was ascribed by Judge FLEMING to the judgment of the *County Court of Accomac*, and by Chief Justice MARSHALL to that of the County Court of *Henrico*, in the opinions and judgments I have mentioned.

The result of my opinion is, that the judgment before us ought to be reversed; the instruction of the Court being erroneous; that, in directing the instruction proper to be given on the future trial, we should affirm the right of the executor to a credit for *all* the items comprehended in the *seven* last errors assigned for the *supersedeas*; that, with respect to the 187*l.* for the land sold, stated in the account, the Commonwealth is entitled to no part thereof, except by application to a Court of Equity, and then only, (as it now appears to us,) *pari passu* with other creditors; and that, as to all the moneys paid by the executor, as stated in his account, to satisfy debts of dignity inferior to the judgment in question, he paid them in his own wrong; and

that *pro tanto* the Commonwealth ought to be permitted to take out its execution.

Judge FLEMING. The three principal points in this case are, 1st. Whether the Commonwealth was barred from issuing a *scire facias* to renew the judgment in question, after a lapse of ten years? and if not, 2d. Whether *actual* notice of the judgment, to the executor, was necessary, or in other words, whether he was not, at his peril, bound to take notice of it, and to govern himself accordingly? And a third question is, whether the General Court erred in instructing the Jury, "that the defendant was not "by law entitled to any credit or discount, for any item in "his administration account, except for the funeral ex- "penses."

On the first point, little need be said. The *English* maxim of *nullum tempus occurrit regi*, seems to have been recognised and enforced by our Legislature, soon after the revolution; as by the act of *October*, 1778. c. 2. s. 4. it is declared, that "no time shall bar the Commonwealth of "execution." And the rule seems to have been well settled in the case of *Kemp* v. *The Commonwealth*, in *October*, 1806.*a*)

(a) 1 *Hen. & Munf.* 85.

With respect to the second point, it seems to be settled that executors ought at their peril to take conusance of debts upon record; and first of all to satisfy them; and although the recovery be in another County than where the testators and executors inhabit, it is not material.(*b*) And on *this* point, the opinion of this Court was unanimous (as well as my memory serves me) in the case of *Mayo* v. *Bentley*, administrator of *Wm. Ronald.* And if an executor or administrator is bound to take notice of a judgment on record, though in a distant country, *a fortiori* is he bound to notice a judgment of the *General* Court, having jurisdiction over the whole State, and where judgments against public debtors are most commonly rendered.

(b) *Cro. Eliz.* 793. *Littleton* v. *Hibbins.*

As to the third point, I have no doubt but the General Court erred in the instruction given to the Jury, at the

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trial: for in the act concerning wills, the distribution of intestates' estates, &c. section 52. it is enacted, that executors and administrators shall be allowed in their accounts, all reasonable charges and disbursements, which they shall lay out and expend in the funeral of the deceased, and *other* their administration, and may be allowed such recompense for their personal trouble, as the Court, in passing their account, shall judge reasonable.

There are several articles of this description, in the executor's account passed by the County Court of *Princess Anne*, and particularly stated in the petition for a *supersedeas*, for which the appellant ought to have had credit, but were rejected by the Jury, in consequence of the erroneous instruction of the Court.

I am also of opinion that the sum of 189*l.* stated in the executor's account to have arisen from the sale of 126 acres of land, left by the will of the testator to be sold for the payment of his debts, was not legal, but *equitable* assets only, and as such distributable *pari passu* among all the creditors; and therefore ought not to be appropriated to the Commonwealth alone.

I am of opinion, upon the whole, that the judgment ought to be reversed.

By the whole Court, (absent Judge LYONS,) the judgment of the General Court REVERSED.

The judgment of this Court was, that the judgment of the General Court "is erroneous in this, that the said "Court instructed the Jury that the defendant, now plain-"tiff, was not entitled to any credit or discount for any of "the items in his account of administration, stated in the "bill of exceptions, except for the funeral expenses; "therefore it is considered, that the said judgment be re-"versed and annulled. And this Court is further of "opinion, that the plaintiff ought to have been allowed all "reasonable charges and disbursements laid out and ex-"pended by him in the administration of the estate of his

"testator, *as stated in his account audited and passed by* "*the County Court of Princess Anne*, and set out at large "in the bill of exceptions; but that the several sums paid "to *Haynes Brent*, *Prudence Thetaball*, *James Simpson*, "*Mary Selden*, *Latima Holstead*, *Gresham Nimmo*, and "*Elizabeth Hunter*, being paid in discharge of debts of "dignity inferior to that of the judgment mentioned in the "said writ of *scire facias*, were paid by the said executor, "so far as the same were paid out of the legal assets of "the testator, in his own wrong, and therefore that he "ought not to have any credit therefor. This court is "also of opinion, that the sum of one hundred and eighty-"nine pounds, the amount of the sales of one hundred "and twenty-six acres of land, stated in the account afore-"said, as left by the will to be sold, not being *legal*, but "mere *equitable* assets, and as such distributable *pari passu* "among all the creditors of the testator, ought not wholly "to enure to the benefit of the Commonwealth, by virtue "of the judgment in question, and, being equitable assets "only, as appears to this Court, is not a proper subject "for the cognisance of a Court of Law; whereupon, It is "ordered, that the Jury's verdict be set aside, and that a "new trial be had in the cause; upon which an instruction "is to be given to the Jury in conformity to the principles "declared by this opinion of the Court, which is ordered "to be certified to the said General Court."

Monday, 15th *May*, 1809.

Buster's Executor *against* Wallace.

1. In declaring on a covenant, it is sufficient to set out the *substance* and *legal effect only* of such parts of the deed as are necessary to entitle the plaintiff to recover; and, in assigning a breach, it is not necessary to do it in the very *words* of the covenant; the *intention* of the parties to be collected from the instrument may alone be stated. If, therefore, the declaration charge a covenant to sell to the plaintiff a certain quantity of land, and to refund all moneys paid therefor, in case the land or any part be lost, it is a sufficient assignment of the breach that "the defendant had "no land at all" in the place specified.

THIS was an appeal from a judgment of the District Court of *Charlottesville*.

The appellee instituted an action of covenant against the appellant's testator, on a written agreement under seal, bearing date the 6th of *April*, 1797, in which agreement, the defendant, by his attorney, in fact, acknowledged to have sold to the plaintiff 500 acres of land, on *Silver Creek* in *Madison* County, State of *Kentucky*, at a certain price per acre, according to three several qualities of the land, to be estimated by two persons designated in the agreement; and further covenanted, "*that if the land or any part thereof* "*should be lost, the said Buster was to refund the money* "*without interest, according to the rates of the land lost;* "*and was to defend all suits at law that might arise from* "*other claims.*" There was no other description of the land in the written agreement; nor were there any further covenants on the part of the defendant.

The plaintiff, in his declaration, recited the contract, and averred, "that, giving faith to the representations of the "defendant's attorney, in fact, and the power made him "by the defendant, he proceeded to pay him one hundred

2. But, even if a breach be badly assigned, it will be aided after a verdict for the plaintiff on an issue joined on the plea that the defendant had not broken the covenant.

3. If *B.* agree to sell *W.* so many acres of land lying on a certain creek, &c. without specifying any boundaries; but a particular tract is shewn to *W.* as the land embraced by the agreement; and they accordingly enter into a contract under hand and seal; *parol* evidence is admissible to shew that *B.* either had no land at all on that creek, &c. or not that *particular* tract which it was understood by the parties was comprehended in the agreement.

4. A Court is not bound to give instructions on *general* and *abstract* propositions; but only on the *actual* case before them.

5. If depositions offered as evidence in a Court of Law contain matter supposed to be exceptionable, the proper course is to point out the exceptionable passages, and then move the Court to instruct the Jury to disregard such passages.

"pounds current money of *Virginia*, which the defendant "actually received; and the plaintiff avers *that the defend-* "*ant had no land at all lying on Silver creek, in the Coun-* "*ty of Madison, State of Kentucky;* and although the "defendant, by contract, was to refund all moneys paid by "him, proportionably to the loss sustained by the plaintiff, "and although the defendant has been notified of the pre- "mises, he has refused to return, although often requested, "the defendant the money thus advanced by the plaintiff, "for a consideration which has entirely failed." PLEA, "*that the defendant had not broken the covenant,*" and issue thereupon.

At the trial, a number of depositions taken in the State of *Kentucky*, (the most important of which were taken after two juries had been sworn in the cause, who could not agree in their verdict,) were offered in evidence by the plaintiff. These depositions, besides containing much hearsay evidence, tended to explain the intention of the parties at the time of entering into the agreement, and to prove covenants on the part of the defendant, which were not inserted in the said agreement; particularly, it was proved by the person who drew the instrument of writing, and afterwards attested it as a witness, that the defendant's attorney agreed with the plaintiff, "*that if he did not prove that* "*the spot of ground on which they then were, was the* "*spot of ground called for by his, Buster's entry, made by* "*a certain Benjamin Blackburn, he would refund to the* "*plaintiff the purchase-money.* After which agreement, "the deponent drew an article between the parties," &c. Whereupon the defendant, by his counsel, moved the Court "to exclude such parts of the depositions, in this "cause, from going in evidence to the Jury, as were at va- "riance with the covenant, or went to explain the same." But the motion was overruled, and the whole of the depositions suffered to go in evidence to the Jury. To this opinion of the Court, the defendant tendered a bill of exceptions, which was signed, sealed, and made a part of the

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record. Verdict for the plaintiff for 300 dollars damages, and judgment thereupon; from which the defendant appealed to this Court.

Hening, for the appellant, made the following points, and cited in support thereof the corresponding authorities.

1. That the breach was not well assigned, because it was neither in the words of the covenant, nor did it comprehend its effect; and was moreover too uncertain. 5 *Com. Dig.* (by *Rose*,) 341. tit. PLEADER, (C. 47.) *Cro. Eliz.* 914. *Chantflower* v. *Priestley*. *Yelv.* 30. S. C. under the name of *Chanudflower* v. *Prestley*.

2. That, by the *terms* of the agreement, the defendant was not bound to refund the money, unless the lands were lost by a legal eviction; which ought to have been averred and shewn by the plaintiff; or, at least, that a stranger entered upon him by virtue of an older and better title existing at the time of the contract. And the want of this averment will not be aided by verdict. 5 *Com. Dig.* (by *Rose*,) 343. tit. PLEADER, (C. 49.) *Vaugh.* 118. *Hayes* v. *Bickerstaff*. *Hob.* 34. *Tisdale* v. *Essex*. *Cas. temp. Hard.* 161. *Jordan* v. *Twells*. *Cro. Jac.* 315. *Kirby* v. *Hansaker*.

Modern determinations, though they do not go so far in requiring that an eviction, by legal process, shall be stated, yet all agree that the entry must be averred and shewn to have been by a person *having lawful right and title at the time of the contract*. 4 *Term Rep.* 617. *Foster* v. *Pierson*. 8 *Term Rep.* 278. *Hodgson, executor*, &c. v. *East-India Company*. 1 *Mass. Term Rep.* 464. *Emmerson* v. *Proprietors*, &c. of *Minot*.

3. That the opinion of the District Court was erroneous on the point reserved by the bill of exceptions; inasmuch as it went to admit parol testimony to go to the Jury, which essentially varied a written agreement.

It is a general rule, that, where there is a written agreement, the whole sense of the parties is presumed to have

been comprised in it; and therefore parol evidence shall not be admitted to disannul or substantially vary it. This was the doctrine of the common law before the statute of frauds existed; and the rules of evidence being the same in both Courts of Law and Equity, parol evidence is no more admissible in the one Court than in the other. 1 *Fonb.* 200. 1 *Roll. Abr.* 379. 4 *Vin. Abr.* 397. pl. 2. 5 *Co.* 68. *Cheyney's* case. *Select Ca. Ch. temp. King.* 30. *Christmas* v. *Christmas.* 4 *Vin.* 132. pl. 13. 4 *Bro. Ch. Cas.* 519. *Rich* v. *Jackson.* 3 *Wils.* 275. *Meres et al.* v. *Ansell.* 2 *Atk.* [384.] 400. *Parteriche* v. *Powlet.* *Bunb.* 65. *Binstead* v. *Coleman.* 3 *Atk.* 8. *Tinney* v. *Tinney.* 1 *Bro. Ch. Cas.* 168. *Hare* v. *Shearwood.* 2 *W. Black. Rep.* 1249. *Preston* v. *Merceau.* 1 *H. Black.* 289. *Gunnis* v. *Erhart.* *Ibid.* 659. *Haynes* v. *Hare.* 2 *Bos.* & *Pull.* 565. *Coker* v. *Guy.* *Cas. temp. Talb.* 240. *Brown* v. *Selwyn.* 2 *Bro. Parl. Cas.* (*Tomlins'* edit.) 99. *Stratton* v. *Payne.* 7 *Bro. Parl. Cas.* 461. 466. *Errington* v. *Broughton.* 1 *Scho.* & *Lef.* 22. *Clinan* v. *Cooke.* 1 *Day's Cas. in Error*, 23. *Northrop* v. *Speary.* 2 *Day's Cas. in Error*, 137. *Dunham* v. *Baker.* 1 *Mass. Term Rep.* 69. *Paine* v. *M'Intier.* 1 *Caines'* (*N. Y.*) *Rep.* 358. *Jackson, ex dem. Putnam,* v. *Bowen.* 1 *Johns.* (*N. Y.*) *Rep.* 139. *Schermerhorn* v. *Vanderheydon.* 3 *Dall.* 415. *Clarke* v. *Russel.* 4 *Dall.* 340. *O'Harra* v. *Hull.*

Hay, for the appellee, admitted the law to be as stated by the counsel on the other side, but contended that it did not apply to the present case.

The declaration, though not very formal, was substantially good; but, even if it were defective, it was too late to take advantage of those defects after verdict. In declaring in covenant *it is sufficient to set out the substance of the covenant and the breach.*(a) In the case of *Bristow* v. *Wright*,(b) it is expressly said by Lord *Mansfield*, "that "if an action be founded on a deed, the plaintiff need not "set forth more than that part which is necessary to enti-"tle him to recover."

(a) *Comp.* 663. *Dundass* v. Ld. *Weymouth.*
(b) *Doug.* 667.

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By the strict letter of the covenant, *Wallace* was to defend any suits which might be brought, and *Buster* to pay the expenses. But the fact was, that there was *no land*. How then was *Wallace* to comply *literally* with the terms of the contract? It is enough that the *intention* of the parties to be collected from the instrument be stated in assigning the breach. This has been done in the present case; and is clearly within the principles of the case of *Bache and others* v. *Proctor*.(a)

(a) *Doug.* 382.

With respect to the instructions of the Court, on the point of admitting the depositions, no other instructions could have been given, from the motion which was made. The Court was asked to exclude from the consideration of the Jury certain *parts* of the depositions. How was the Court to comply? Were the Judges to erase the exceptionable parts? Certainly not. The proper course would have been for the counsel to select such *parts* as he deemed improper evidence, and move the Court to instruct the Jury to disregard them. Not having done so, the Court could not have done otherwise than permit the whole depositions to go to the Jury; not being presumed to have seen those parts which were excepted to.

Wednesday, *May* 28. The Judges gave their opinions.

Judge TUCKER. *Wallace* brought covenant against *Claudius Buster*, for that the defendant by his covenant, did covenant and agree to sell to the plaintiff 500 acres of land in *Kentucky*, lying on *Silver Creek*, in the County of *Madison*, for which he was to pay at a certain rate; and the plaintiff avers that giving faith, &c. he proceeded to pay 100*l.* which the defendant actually received; and avers that the defendant had no land at all lying on *Silver Creek*, in the County of *Madison*, in *Kentucky*; and although the defendant, by contract, was to refund all moneys paid by him *proportionably* to the loss sustained by the plaintiff, and although the defendant hath been notified

of the premises, he hath refused to return (although often requested) the defendant the money thus advanced by the plaintiff, for a consideration which has entirely failed, to the plaintiff's damage, &c.

The defendant pleaded, that he had *not broken* the covenant in the plaintiff's declaration mentioned, *as the plaintiff against him hath alleged*, and thereof he puts himself upon the country, and issue was joined.

Mr. *Hening*, for the appellants, has taken two exceptions to this declaration. 1. That the breach is not well assigned; because it is neither in the words of the covenant, nor does it comprehend its effect, and is moreover uncertain. 2. That by the terms of the agreement, the defendant was not bound to refund the money, unless the lands were lost by a legal eviction, which ought to have been averred and shewn by the plaintiff.

As to the first of these exceptions. How far the technical phraseology of the declaration might have been judged deficient upon a special demurrer, it is unnecessary to inquire, since the defendant, by his plea, has admitted that the plaintiff hath *alleged* a breach of his covenant. But with regard to *substance*, the case of *Bache* v. *Proctor*,(a) which was upon a special demurrer, is, in my opinion, a conclusive authority in favour of the plaintiff, if indeed authority upon so plain a case could be required. As to the second, I see nothing in the contract, to warrant Mr. *Hening's* conclusion, that the defendant was not bound to refund the money, unless the lands were *lost by a legal eviction*. The covenant does not import to be a *legal conveyance* of the lands therein mentioned; there being no such description of the lands therein, as that the purchaser could have entered, and possessed himself thereof; but is merely such a contract, as a Court of Equity would compel the specific execution of, or a Court of Law give damages for breach of.

(a) *Doug.* 382.

The vendor might have had a thousand, or ten thousand acres of land on *Silver Creek* in the same tract, or in a do-

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zen different tracts; into none of which would it have been lawful for the covenantee to enter upon this contract. It is therefore a *petitio principii* to say, that the covenantor was not bound to refund, unless the lands were *lost by a legal eviction*, which presupposes an entry and actual possession; neither of which could happen, if, in fact, as is alleged in the declaration, the covenantor had no lands on *Silver Creek* in the County of *Madison*, as by the covenant is supposed.

With respect to the exception taken at the trial. It was not to be supposed or expected, that the Court could be so well apprized of the contents of the depositions, as to be able to select, without the aid of counsel, those parts which the Jury ought to *disregard*. The depositions being regularly taken, and read without objection, could not be withheld from the Jury, *partially*; the Court could not direct any *erasure*, as has been supposed; and it was the duty of the counsel, specially to recite those parts which he objected to the Jury's considering. Had he pointed out the passages, and it had appeared improper that those passages should be considered as evidence before the Jury, the Court could no doubt have instructed the Jury to disregard them; but he not having proceeded in that manner, I cannot charge *his* omission, as an error committed by the *Court*. I think the judgment ought to be affirmed.

Judge ROANE. The declaration in this case, though very ill drawn, charges a covenant to sell to the appellee 500 acres of land on *Silver Creek*, and also to refund all moneys paid therefor, in case the land or any part be lost. It charges breaches in that the appellant had in fact "no "land at all lying on *Silver Creek*;" that the consideration for which a sum of 100*l.* was paid under the said contract "had entirely failed," and that the said 100*l.* was not refunded.

(a) 1 *Wash.* 204.
(b) *Doug.* 368. 1st edit. 382. 3d edit.

The cases of *Hawkins* v. *Berkeley*,(a) *Bache* v. *Proctor*,(b) and others, fully justify this assignment of breaches,

in reference to the agreement on which the action is founded: the breach is substantially laid, according to the intention of the parties, which was to warrant to the appellee the land sold, or, if lost, to refund any moneys paid therefor.

With respect to the motion made by the defendant to the Court, it was, "that the Court should exclude such "parts of the depositions from going in evidence to the "Jury, as were at variance with the covenant, or went to "explain the same." And again, in another part of the bill of exceptions, the motion is stated to have been "to "arrest from the consideration of the Jury so much of "the *depositions* as went to establish a fact out of the co-"venant stated in the declaration; *particularly those parts* "*of the depositions which say that at the time of entering into* "*the said covenant, the defendant was bound to refund the* "*money, if he did not prove that the land whereon the plain-*"*tiff lived was the very land called for by the defendant's* "*entry.*"

With respect to the first part of the instruction required from the Court as above, the motion was, *perhaps*, too *general*, and the instruction required, of too *abstract* a nature. If given, it would have left the Jury much as they were, as they would still have to judge whether this or that particular piece of testimony was admitted or rejected by the instruction. But the Court were justified on another ground in refusing to give the instruction; and that is, that, upon inspecting the whole of the depositions, it appears that every part thereof was admissible. If they gave a correct opinion upon the *actual* case before them, they are to be excused from answering general and abstract questions. The latter part of the motion, indeed, propounds a *particular* question to the Court; but I am of opinion, that the decision of the Court thereupon was also correct.

Indeed, all the testimony contained in the depositions tends either to prove, that the appellant had no land at all

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on *Silver Creek;* or that he had not that *particular* tract which it was understood and agreed between the parties was the tract embraced by the agreement. Evidence to this last point was not contradictory to the agreement; was not *out* of the same: it is consistent therewith: it is like the common case of admitting evidence to shew *which John* was meant, when there are *two*, and *one* is mentioned in a deed or agreement.

On the whole, I am for AFFIRMING the judgment.

Judge FLEMING. The counsel for the appellant stated three points on which the judgment ought to be reversed.

1. That the breach is not well assigned, because it is neither in the words of the covenant, nor does it comprehend its effect, and is too uncertain.

2. That the defendant was not bound to refund the money, unless the lands were lost by a legal *eviction*, which ought to have been averred and shewn by the plaintiff; and,

3. That the court erred in admitting parol testimony to go to the Jury, which essentially varied a written agreement.

With respect to the first point, the breaches are well assigned, according to the principles laid down in the case of *Bache and others* v. *Proctor*, *Doug.* 382, that it is not necessary, in assigning breaches, to use the express words of a covenant; and that the *intention of the parties*, to be collected from the instrument itself, may well be stated in assigning breaches, though not particularly expressed in the covenant. But admitting that, on a special demurrer, the assignment of breaches would have been adjudged insufficient, they are certainly good after a verdict.

As to the second point, "that the defendant was not "bound to refund the money, unless the lands were lost "by legal *eviction*," there is no such article in the agreement; and the counsel should have explained to the Court how the defendant was to have been evicted of lands of which he was never seised or possessed,

With respect to the admission of improper evidence to go to the Jury, it appears that the depositions were legally taken, and I perceive no error in the Court's permitting them to go in evidence to the Jury.

By the whole Court, (absent Judge LYONS,) the judgment of the District Court was AFFIRMED.

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Marks and wife, &c. *against* Bryant and wife.

Monday, 1st May, 1809.

THIS was a controversy concerning the establishment of the nuncupative will of *Travis Womack*, deceased. *John Marks* and *Patsy* his wife, and *Polly Titmarsh* were the legatees interested in establishing the will; and, at their instance, *Thomas B. Bryant* and *Sally* his wife were summoned to *Prince George* County Court, *September* term, 1804, to shew cause, if any they could, against its being admitted to record. The County Court, on hearing the parties by counsel, and the testimony on both sides, being of opinion "that the nuncupative words of *Travis Womack*, deceased, which were committed to writing within "six days after the speaking thereof were, by the said "*Womack* used in his last sickness, and that he was taken "sick from home, and that he died before he returned to "the place of his habitation; and also, that he called on "*Edward Marks*, jun. and *Jemima Simmons*, then present, "to take notice that such words were his will; ordered "the said words to be established as the nuncupative will "of the said *Womack*, and that the same be recorded;" from which decision *Bryant* and wife appealed to the

1. In every case of an appeal in a controversy concerning the probate of a will, the original paper exhibited for probate ought to be brought before the appellate court, by writ of *subpœna duces tecum*: if such paper cannot be had, the order admitting it to record, or rejecting it, ought neither to be affirmed nor reversed; but the appeal should be dismissed.

2. A nuncupative will not made at the *habitation* of the deceased, nor where he had resided for *ten* days next preceding, but authenticated as the law requires, ought to be established, notwithstanding his being *very unwell* when he left home; if, afterwards, he was taken more dangerously ill, and died at the place where such will was made.

3. Although in committing a nuncupative will to writing, within six days from the speaking of the testamentary words, a distinct and independent part thereof be omitted, the residue of the will is not thereby vitiated.

4. A testator's bequeathing (among other things) an article of property which does not belong to him, is, at most, only a *circumstance* from which to infer a state of mind unfavourable to the making of a testament; and ought not to prevail against positive testimony, shewing his competency to make a will at the time in question.

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District Court of *Petersburg*, where the said order was reversed without assigning any reasons; and thereupon *Marks* and wife and *Polly Titmarsh* appealed to the Court of Appeals. The record being opened here, it appeared that a *copy* of the writing exhibited as a memorandum of the nuncupative words was inserted; but the original will was not sent to this Court. A *subpœna duces tecum* to bring up the *original* (directed to the Clerk of *Prince George* County Court) had been awarded prior to the present term; but the paper had not been produced.

Hay, for the appellees, insisted that the *original* must be produced. Unless the will itself were before this Court, it cannot hear witnesses; for, in order to decide correctly in its appellate capacity it must have the same document before it which was exhibited to the Court below. If it must take up the subject on the *same grounds* as the Court below, the inference is irresistible. The will in this case was once in the custody of the Clerk of *Prince George*, but is now lost. The only remedy to set up a *lost* will is *in equity;* the invariable practice being to bring a suit in Chancery, in such cases. Its having been recorded in *Prince George* is of no avail; for that judgment (being reversed) is now as if it never had existed. If the judgment of this Court should be that *the will* be admitted to record, how can this be done unless the paper itself be produced? In the cases of *Bates* v. *Holman*,(a) and *Temple* and *Taylor* v. *Temple*,(b) the original wills were seen and inspected; and such has been the uniform usage of this Court. The language of the law,(c) "when *any will* shall be produced for probate," cannot be satisfied by any thing but the production of the *original*.

(a) 3 *Hen. & Munf.* 502.
(b) 1 *Hen. & Munf.* 476.
(c) *Rev. Code*, vol. 1. c. 92. s. 13. p. 162.

George K. Taylor, for the appellants, said that, if the original ought to be before the Court, his clients were not to blame for its non-production. As to the loss of the will,

this Court is trying the cause *on the record.* The will *was* admitted to record, and entrusted to the Clerk to be safely kept at his peril. There is no certificate from him that it is lost; neither is it certain, from any thing judicially appearing, that such is the case. The only inquiry then is, whether it is, in *all* cases, necessary for this Court to have the original will before it. Where it is suggested that the original would throw any light on the subject, (as by interlineations, erasures, &c.) the Court will require it; but, where there is no such suggestion, it is unnecessary and unusual. In the case of *Richard Squire Taylor's* will, the original was sent for, because it was suggested that the appearance of the paper itself would show the incapacity of the testator. So in *Bates* v. *Holman*, inspection of the paper itself was all important: but in this case no ray of information would be received by the Court from seeing the original.

Hay. Mr. *Taylor* has very ingeniously varied the aspect of the cause. He says there is no evidence that the will is lost. If so, then I call upon him to produce it. But he asserts there is nothing in *this* will which may not be seen on the record. How is that known? We wish the original will to be seen, for *this purpose.* It will appear that the person who wrote it was so ignorant of orthography, or language, that he actually *made* some words. The production of the paper itself may afford very material facts to enable the Court to judge of the ability of the writer to certify correctly the terms of the will. Suppose the paper were written with ink of different colours, and with different hands. These circumstances might weigh; and the consideration that such circumstances might exist, shows the propriety of introducing the original on all occasions, that the Court may determine upon its face.

Taylor. Why did not Mr. *Hay* move for a *subpœna duces tecum* to bring up the original, if he wanted it?

Judge TUCKER observed, that the party appellant was bound to produce the paper, if required. The Court and

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witnesses ought to inspect the very paper. The proper course probably is to direct a *subpœna duces tecum* to the Clerk of the *District Court*; for he ought to have retained it in his office. My opinion is, we should proceed no further, at present, until the original paper be produced, or the *subpœna* be returned.

Judges ROANE and FLEMING wished to take time to consider the point; and by consent the witnesses were examined.

The *substance* of the evidence (which, according to the rule of this Court, was taken down in writing in open Court) was, that the testator, being a young unmarried man, and boarding with a Mr. *Gary*, *at City Point*, left that place the *Sunday* before his death, on a visit to his only sister, the wife of *Bryant*, the appellee; that he was then very ill, "his disorder having begun with the ague and "fever, and, from that, turned to a constant fever and sore "throat;" that he rode to *Bryant's*, a distance of twelve miles, and there growing worse, (with the subsequent symptom of a disorder in his bowels,) died on the following *Sunday*; that he had been delirious, at times when the fever was on him, before he left *City Point*; and, after his arrival at *Bryant's*, was frequently delirious, both before and after his speaking the testamentary words; but was in his senses *at the time* of speaking them, which was in the presence of *Edward Marks*, *Henry Simmons* and *Jemima Simmons*, (who all concurred in their testimony as to this point,) and of the three appellants; *Bryant* and wife not being present; that he called on all the persons present to take notice that what he had said was his will; (as to which circumstance *Edward Marks* and *Jemima Simmons* agreed, though *Henry Simmons* did not recollect it;) that he gave to his *cousin Patsy Marks*, wife of *John Marks*, the appellant, who had been his guardian, and for whom he expressed great regard, his negro woman *Sukey*, worth about forty-five pounds; and to his "*poor* old" aunt *Polly Titmarsh*, a sum of money out of his estate, to buy her a

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horse, (for which he said he supposed eighteen or twenty pounds would be sufficient,) together "with an old field lying near her house, called *Hackney's*, and a line to be run "so as to include sixty acres of land;" (which last-mentioned bequest, being of *real* property, and *nuncupative only*, could not have its intended effect;) that the testator had other personal property, viz. a negro man worth about four hundred dollars, a boy worth about two hundred, and two horses, which, together with his land, fell to *Bryant's* wife, as his nearest relation and heiress; that he owned a hundred acres of land; and had owned a part of another tract which *Bryant* had bought of him, and for which a part of the purchase-money was unpaid; that he owed some debts, the amount not ascertained; that *Bryant* was in good circumstances, and *Marks* rather embarrassed; that the testator, at the time of speaking the testamentary words aforesaid, also said that he gave to Mrs. *Simmons* (the witness) a desk, then in the room, which he pointed to and said was his, though in fact it was the property of *Bryant;* that the bequest of the desk was not committed to writing, because (as she stated on oath) she determined not to claim it, and had always said she would not; that *Edward Marks* drew and signed the writing; (in the form of a certificate of what the testator had said;) that *John Marks*, the appellant, afterwards carried it to Mrs. *Simmons*, and read it over to her several times before she signed it; which she did on the 26th of *October*, 1803; the words having been spoken on the 21st.

Tuesday, May 2d. The examination of witnesses having been finished, Mr. *Hay* said he was willing to waive his objection to the non-production of the original will, his clients being anxious to have the controversy settled without further delay.

Judge ROANE observed that, on reflection, he was of opinion that the original will ought to be produced, and that it was not in the power of either party to waive it.

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Judge FLEMING concurred, and thereupon a *subpœna duces tecum* was awarded to the Clerk of the District Court, and another to the Clerk of the County Court, both returnable the 13th of *May*.

Mr. *Hay* then submitted the following propositions to the Court.

1. The pretended testamentary words were not a good nuncupative will under our act of Assembly ;(*a*) because the last illness of the decedent did not commence at the place where he died; neither was he *taken* sick from home.

(*a*) *Rev. Code*, vol. 1. c. 92. s. 5. p. 161.

2. The decedent was not sufficiently in his senses to make a will. His supposing a desk to be his which notoriously was the property of Mr. *Bryant* was a plain proof of the wandering of his fancy and defect of his intellects.

3. If he was in his senses, the omission to insert the desk in the written memorandum or certificate of the will was fatal ; because the *whole* of the testamentary words, or the substance thereof, should have been committed to writing within six days after making the will.(*b*)

(*b*) *Ibid.* s. 6.

George K. Taylor. The *last* objection is answered by observing, that the will is good as far as it goes. As to the *first*, the conditions of the act of Assembly have been *substantially*, if not *literally*, complied with.

Judge ROANE asked Mr. *Taylor* if he had inquired into a difference between the stat. 29 *Car.* II. in *England*, and our act of Assembly ; the word "*surprised*" being in the *former*, and not in the *latter* ? (*c*)

(*c*) See 2 *Bl.* 501.

Mr. *Taylor* observed, that the omission of that word in the act of Assembly, shewed the intention of the Legislature to adopt a broader and more liberal rule than that established by the statute 29 *Car.* II. since they had the act before them when legislating on the subject. He submitted the question, upon the evidence, relative to the state of the decedent's understanding *at the time* of his making the will.

Saturday, May 13. In obedience to the writ of *subpœna duces tecum*, the Clerk of *Prince George* attended with the original will, which, on inspection, was found to have been truly copied in the record. The bequests contained in it were, in *substance*, as above mentioned in our summary of the evidence, and no suspicious circumstance appeared on its face.

Thursday, May 18. The Judges pronounced their opinions.

Judge TUCKER. *Travis Womack*, a young man, unmarried, on a *Sunday* in *October*, 1803, having been for some time in bad health, mounted his horse at *City Point*, where he resided as a boarder in the family of Mr. *Garey*, and rode twelve miles to the house of the appellee *Bryant*, whose wife was *Womack's* sister, where he arrived so ill, that he took to his bed, and died the following *Sunday*. During his illness he made a nuncupative will, whereby he left a negro woman, worth about 45*l.* to the appellants, *Marks and wife*, which is the subject of the present controversy.

The first question which seems to have presented itself, is whether *any* nuncupative will made by the deceased under these circumstances would be valid. The doubt seems to arise from these words in the law. "No nuncupative will shall be established unless it be made in the "time of the last sickness of the deceased, *at his habitation*, "or where he hath resided for ten days next preceding, except where the deceased was TAKEN *sick from home*, "and dies before he returns to such habitation." *L. V.* ed. 1794. c. 92. sec. 5. Now, as the deceased was not ten days at the place where he died, before that event happened, and is proved to have been very sick *before* and even *when* he left his usual habitation, it seems to be questioned whether he could be said to be taken sick from home.

I conceive it would be adhering too closely to the letter of the law, if we were to pronounce that no nuncupative

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will made under such circumstances ought to be established. The object of the law was to prevent frauds and impositions upon sick persons, by enticing them from their friends and relations, to the residence of strangers, where advantage might be taken of their weakness and infirmity; or where such pretended wills might be fabricated without the desire, or even knowledge, of the deceased, or any of his friends. The decedent in the present case, set out on a visit to his sister, and her husband: he thought himself able to ride so far; in this he proved not to have been literally mistaken, though probably the journey hastened his death. He was a mere *sojourner* at *City Point*. He had no mansion-house there, nor was he in the family of his father, mother, or other near relation there. He went to the house of his nearest, or one of his nearest relations, the very persons who now contest this will. Although he was not *first* TAKEN *sick* there, he was TAKEN *so much worse* than he had been before, as never to leave the house again; it appears to me, therefore, that the case is so far fully within the true intent and meaning of the law.

With respect to the sanity of the testator, and the proof that he meant to give these little tokens of his gratitude and affection to his relations, one of whom had been his guardian, I feel not the least doubt either of his capacity, or intention to make such a disposition, and therefore am of opinion, that the judgment of the District Court be reversed, and that of the county Court affirmed.

Judge ROANE. Upon the testimony in this cause, it is clear that the testator was fully competent to dispose of his estate at the time of making the will in question; and that he made a serious and solemn disposition of the property comprised in the same, and desired the persons present to take notice thereof.

Two objections, however, are made in point of law; 1. That the substance of the will in relation to the WHOLE

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property bequeathed by him at the time, was not reduced to writing within six days ; and, 2d. That the testator was not TAKEN sick FROM HOME, and consequently had no power to make a nuncupative will under the provisions of our act.

As to the first objection, it does not apply to this case. In this case *two* months had not elapsed between the date of the bequest and the offering the will for probate in *Prince George* Court. The act only provides that *after six* months have elapsed from the time of speaking the pretended testamentary words, no evidence shall be received to establish them, unless the testimony, or the substance of it, was reduced to writing within six days. The reason of this is obvious; but it does not apply in the case before us; and, therefore, as to the desk which is said to have been bequeathed at the time, but not mentioned in the memorandum, the bequest of it might, notwithstanding, have been established as a part of the will by *oral* testimony, at any time within six months. The bequest of the desk ought, upon the testimony, to have been added to, and made part of the nuncupative will, had it been proved by two witnesses *other* than a *legatee*: but, as it is, this bequest was rightly omitted as a part of the will, because it could not have been proved, otherwise than by the testimony of the legatee herself. I infer this under the *reason* at least of the 9th section of the act concerning wills.(*a*)

(*a*) *Rev. Code*, vol. 1 p. 161.

As to the next point: under the statute of *Car.* II. in *England*, and our former act on this subject,(*b*) no nuncupative will is good when it is made *from the home* of the party, unless the testator has been "*surprised*, or taken "sick at the place where the will is made;" and *Blackstone*,(*c*) commenting on the *English* statute, says, that "favour should not be shewn to nuncupative wills, unless "the party has been *surprised* by SUDDEN and VIOLENT "illness." This would seem to limit nuncupative wills made from the home of the parties to cases in which the party was *convalescent* when he left home, and was taken

(*b*) *V. L.* edit. of 1769, p. 161.

(*c*) Vol. 2. p. 501.

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ill *for the first time* after he had left it. In our act of 1785, however, this word "*surprised*," is omitted;(*a*) whence I infer, that a will may still be established as a nuncupative will, although the party was UNWELL when he left home; if afterwards he was *taken* more dangerously ill at the place at which the will was made, and of which illness he afterwards died. I cannot on any other ground account for the omission of the word "*surprised*," in the act of 1785.

(*a*) *Rev. Code*, vol. 1. p. 161.

It is in proof in this case that the party was indeed very *unwell* when he left home; but his disorder was, perhaps, only the ague and fever, which, generally, is not mortal, and he was well enough at the time, to ride twelve miles on horseback. His illness probably increased soon after his arrival at the place of his destination, and very possibly assumed its character of danger from the fatigue of the journey *only*. There is no evidence shewing that he was taken with the *illness of which he died* prior to his leaving home, though he was then unwell; and, on this ground, I hold this will to be authorized, under the true construction of the act of Assembly.

With respect to his bequeathing a desk which it is *said* belonged to another, it is at most only a circumstance whence to infer a state of mind unfavourable to the making of a testament: it is a circumstance which often happens with many testators who bequeath property not their own; and, in this case, that equivocal circumstance is outweighed by positive testimony, shewing a competency in the testator to make a will at the time in question.

I am therefore for reversing the judgment.

Judge FLEMING, verbally expressed his concurrence with the rest of the Court, saying the case was so clear that it was a good will under the act of Assembly, it was unnecessary for him to add any observations upon it.

Judgment of the District Court reversed, and that of the County Court affirmed *unanimously*.

Dabney and others, Executors and Legatees of Sadler, *against* Green.

Tuesday, May 16th.

THIS was a suit instituted in the late High Court of Chancery, (and afterwards transferred to the Court for the *Williamsburg* District) by *Robert Green*, of *Matthews* County, against the executors and legatees of *Robert Sadler*. The bill stated, that the complainant, being indebted to *Sadler*, did, on the 7th of *March*, 1788, execute a deed conveying to him six negro slaves, (mentioning their names,) with all their future increase, the consideration stated in the said deed being 126*l.* 11*s.* current money; that though the said conveyance was absolute, it was only meant and intended to operate by way of mortgage for the said sum of money, which was a debt due from the complainant to the said *Sadler*, payable on the 7th of *March*, 1791; that *Sadler*, at the time when the deed was delivered, executed and delivered to the complainant a *defeasance*, whereby he agreed, that on payment by the complainant of the said sum of money on or before the 7th of *March*, 1791, the right of *Sadler* to the slaves should cease; that it was understood and agreed that the complainant should keep possession thereof, paying interest on the money, for which, on the 10th of *March*, 1788, and the 10th of *March*, 1789, he executed a writing, promising to *pay* the said *Sadler* the sum of 6*l.* 6*s.* 6*d.* which, though it was expressed to be for the hire of the said slaves, was meant and agreed to be for interest on the said debt: that the complainant continued possessed of the said slaves till about the 8th of *December*, 1789, when he being some short time absent from home on ne-

1. Under circumstances, a bill of sale, though absolute on its face, will be deemed a mortgage; the true question always being whether a *purchase* of the property, or a *loan of money* or *forbearance of a debt* were intended.

☞ *In this case*, the circumstances proving the bill of sale to have been intended as a mortgage, were gathered from other *writings* and *acts* of the parties.

2. A mortgagee, by obtaining a judgment at law for his debt, and purchasing the mortgaged property under execution thereupon, does not, *in general*, deprive the mortgagor of the right of redemption. But, if such judgment and execution were upon an attachment against the mortgagor, as an absconding debtor, attempting to defraud the mortgagee of his security by removing the property out of the State, he shall not be permitted to redeem, under the influence of the maxim, "that he who hath "done iniquity shall not have equity."

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cessary business, *Sadler* took out an attachment against him as an absconding debtor, which was levied on the said slaves and a child, the increase of one of them, and obtained a judgment for the sum of 139*l.* 4*s.* that thereupon the slaves attached were sold by the sheriff on the 13th of *May*, 1790, and the whole were purchased for 159*l.* by *Sadler* himself, who took them into possession, and held them (except one whom he sold) until his death, which happened about the year 1793. The prayer of the bill was, that the complainant be permitted to redeem the slaves by paying whatever balance should be found due from him on a settlement; that *Sadler's* estate be charged with the price of the slave sold by him, and with the hire of the other slaves since he took possession, and for general relief.

The joint and several answers of the defendants admitted the complainant to have been indebted to their testator when the deed of *March* 7th, 1788, was executed; but insisted, that the said deed, being absolute, amounted at law, and in equity, to a positive transfer of the slaves, and that the paper, called by the complainant a defeasance, did not convert the said bill of sale into a mortgage, but only secured to him the privilege of repurchasing them. The defendants believed it to be true that he remained in possession thereof, until about the time when he absconded; but neither knew, nor had any reason to believe, that any agreement was made between the said *Sadler* and him, that he should retain them, paying interest annually on any sum supposed to be due. They denied the attachment to have been unfairly obtained, averring the proceedings thereon were fair and just; that when it was issued, the complainant, being in embarrassed circumstances, was actually absconding, (leaving to his creditors no prospect of being ever paid,) and, with his family and property, and all the said slaves, (except a woman and three children,) was on board a vessel in *White's Creek*, about seven or eight miles below his former place of residence, privately removing from this Commonwealth; at which place a for-

tunate calm taking place, the Sheriff was enabled to levy the attachment; that, at the sale of the slaves, which was made by the Sheriff, after public notice duly given, *Sadler* purchased only a woman and three children, at 60*l.* the Sheriff himself bought another woman and child, and afterwards sold them to *Sadler*; that the negro, said in the bill to have been sold by *Sadler*, was bought by a certain *Mordecai Gregory*, and was never in *Sadler's* possession. The respondents were informed and believed, that the complainant instructed the Sheriff to pay the surplus money resulting from the sale, (which exceeded the amount of the judgment,) to a certain —— *Lowry*, to whom the complainant was indebted; and concluded with insisting on the title of *Sadler* to the slaves so purchased as aforesaid.

Two witnesses fully supported the allegations in the answers relative to the complainant's being actually absconding when the attachment was levied; and no depositions on his part appeared in the record. The exhibits were, 1. The absolute bill of sale from *Green* to *Sadler*, dated *March* 7th, 1788, signed, sealed, and acknowledged in the presence of three witnesses. 2. A receipt from *Green* to *Sadler* for 126*l.* 11*s.* "in full for six negroes sold and "delivered." "Witness his hand and *seal*." Dated *March* 8th, 1788, and attested by the *same* three witnesses. 3. The writing called in the bill a *defeasance*, attested by *one of the same* witnesses, and being in these words:—

"*March*, 1788, having purchased and received of *Ro-*
"*bert Green*, six negroes, (inserting their names,) as men-
"tioned in a bill of sale, I do hereby agree and oblige my-
"self, my heirs, &c. should the said *Green* be desirous of
"purchasing the above-mentioned negroes again, that
"upon his the said *Green* paying me the sum of one hun-
"dred and twenty-six pounds eleven shillings, on or be-
"fore the seventh day of *March*, one thousand seven hun-
"dred and ninety-one, he may have the above-mentioned

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"negroes again, free from any claim whatsoever. In wit-
"ness, I have this day set my hand and seal.

"ROBERT SADLER." (Seal.)

4. A copy of the record of the proceedings on the attachment. 5. *Green's* bond to *Sadler*, dated *March* 10th, 1788, for 6*l.* 6*s.* 6*d.* "for the *use* or *hire* of six negroes by "name," payable the seventh of *March* ensuing, and attested by the *same* three witnesses who attested the bill of sale. 6. *Green's* bond to *Sadler*, dated *March* 10th, 1789, but in other respects precisely in the same words with the former bond, attested by *one* of the *same* witnesses, and by another person.

The Chancellor, (on the 25th of *April*, 1804, (being of opinion, that the fair intention "of the parties was, that "the slaves conveyed by the plaintiff to *Robert Sadler* "should remain mortgaged for the payment of the princi-
"pal debt and interest due to the said *Sadler*," ordered an account to be taken of the "hires and profits of the said "slaves since the thirteenth day of *May*, 1790, (being the "day of sale by the Sheriff,) making a just allowance for "the expense and improvement of the young negroes; "also an account of the number, names, and respective va-
"lues of all the slaves sold by virtue of the execution, "founded on the attachment against the said *Robert* "*Green*, and of their offspring, and the name or names of "the person or persons in whose possession the said slaves "and their offspring now are; and also of the amount of "the debt due from the plaintiff to the estate of the said "*Robert Sadler*, with the interest thereon;" and, on the prayer of the defendants, granted them an appeal from the said order.

M'Rae, for the appellants. 1. The original contract was not a mortgage, but a conditional sale. No attempt has been made to shew any acknowledgment by *Sadler*, that it was intended as a mortgage. No agreement is proved but that in writing; in which there is no covenant for repayment of the money, but only that *Green* might

repurchase the slaves within three years. *Chapman* v. *Turner*(*a*) is not so strong as this case; for *there* the writing mentioned that the negro was put into *Turner's* hands "*as security*;" but no such words, nor any equivalent, were used *here*. If it was a conditional sale, *Thompson* v. *Davenport*(*b*) puts an end to the question: for, in such case, the person wishing to avail himself of the privilege of repurchasing, must pay punctually to the day, and cannot redeem after the time has elapsed. But,

(*a*) 1 *Call*, [illegible].

(*b*) 1 *Wash.* 125.

2. Whether it was a conditional sale or mortgage, the purchase by *Sadler* under the execution, vested in him a new and absolute right. The issuing of the attachment was produced by the conduct of the appellee himself; and he must answer for all the consequences in the same manner as if the sale had been by his own consent. The case of *Moore's Executor* v. *Aylett's Executor*(*c*) shews that the surplus only ought to be paid, where the sale by the *mortgagee* is with the consent of the *mortgagor*. Here *Sadler* (for any thing that appears) purchased only to the amount of his debt.

(*c*) 1 *Hen. & Munf.* 29.

3. *Sadler* and his representatives had *five* years peaceable possession before *Green's* bill to redeem; which, according to the case of *Newby's Administrator* v. *Blakey*,(*d*) vested in them an absolute title. I admit that *five* or even *ten* years' possession will not bar the title of the mortgagor, where the mortgagee holds *as mortgagee*: but *Sadler* held by virtue of his purchase of the Sheriff in *May*, 1790, and not as mortgagee. His possession was therefore *adverse*, and his title good by length of time.

(*d*) 3 *Hen. & Munf.* 57.

Wickham, for the appellee. If this was not a mortgage, I know not in what terms a mortgage can be defined. It is true there was a bill of sale, but there was also a cotemporaneous defeasance; and its being on a *different*, instead of the *same* piece of paper, makes no difference. If the defeasance had been incorporated with the bill of sale, no doubt could have been entertained. What is it that con-

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stitutes a mortgage but the reservation of a right to redeem, or *repurchase*, the property by payment of the money? The person who sells the negroes in this case *remained in possession*, always having power to redeem. The interest of the money, and the nominal hire of the slaves, agree exactly. This is conclusive, to shew that a *loan* only was in contemplation. In *Ross* v. *Norvell*,(a) possession passed with the deed, and hire was paid; yet it was decided to be a mortgage. *Robertson* v. *Campbell* and *Wheeler*(b) is up to the same point. In that case, though the parties, "through fear of a Chancery suit," would not make it a mortgage, the Court decided it to be one. No attempt of the parties can defeat the justice of a Court of Equity, which will always give the mortgagor relief, wherever the real object of the contract was a *loan*. No argument can be drawn from the absence of a covenant to pay the money. In *Ross* v. *Norvell*, there was no such covenant. In *Chapman* v. *Turner*, the object was a *purchase*; and testimony of this contravened the natural effect of the writing. It is said, 2 *Call*, 429. that the *special circumstances* of that case determined it to be a conditional sale; and that the great *desideratum* in all such cases is to ascertain whether the object was a *purchase*, or a *loan*. Certainly, if there was any doubt here, the proceedings at law are conclusive in our favour on this point. *Sadler*'s own attachment considered it as a *debt*, and demanded it as such.

(a) 1 *Wash.* 14.

(b) 2 *Call*, 424.

As our right is purely *equitable*, we cannot be barred by any proceedings *at law*. The sale under the execution was long before the period for redemption had passed. The sale, therefore, did not take away the right to redeem. It is true the money was raised by it before the time allowed; but justice has not been done. *Sadler* should be considered as a trustee for *Green* for so much as the value of the slaves exceeded the debt and inerest; and, according to *Whichcote* v. *Laurence*,(c) and *Campbell* v. *Walker*,(d) a trustee having a right to *sell*, yet *purchases*, clothed with

(c) 3 *Ves.* jun. 740.

(d) *Ibid.* 678.

the original trust. In *Newby's Administrator* v. *Blakey*,(*a*) there was *no trust, no equity.* The act of limitations is not *pleaded*, as it must be when relied upon in a Court of *Equity* ; neither does it appear at what time this bill was filed.

(*a*) 3 *Hen.* & *Munf.* p. 57.

Hay, in reply. Whether this was a mortgage or conditional sale, must depend on the words of the written contract, and the circumstances in evidence. In the contract, it is expressly declared to be a *purchase;* and privilege is given to *repurchase*, without saying any thing about security for a *debt.* On the face of the papers, then, it is a conditional sale. I admit that, in many cases, contracts, *appearing* to be conditional sales, have been decided to be mortgages; the only question being what is the real intention of the parties. But where, *in terms*, a contract is a conditional sale, it is incumbent on the party, who contends it is a mortgage, to shew it by evidence. In this case, there is not one deposition shewing the contract to be different from what it appears on its face. There is no reciprocity on this subject. The parties stand on very unequal terms. If all the negroes had *died*, *Sadler* could not have come before a Court of Equity, contending that his bill of sale was a mortgage, and have claimed his debt out of other property. The evidence, therefore, which *Green* should be required to produce to prove it a mortgage, ought to be strong.

As to the circumstances, independent of the face of the written contract, (which, according to 2 *Call*, 429. we have a right to examine,) the inequality between the value of six negroes and 126*l.* 11*s.* for which they were sold, is relied on ; but this inequality does not appear in the record. There is no proof of the ages or values of the slaves. Mr. *Wickham* relies on *Sadler's* having sued out an *attachment*, as conclusive evidence that the original contract was a *mortgage.* Perhaps *Sadler* was improperly advised. If a *purchaser*, and not a creditor by *mortgage*, his proper re-

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medy was by writ of *ne exeat:* but it was a desperate case, a case of necessity; and his counsel probably thought the shortest cut the best. However, as this act of *Sadler* was long subsequent to the contract, and induced by necessity, it ought not to be considered as evidence of the true construction of that contract. The time that elapsed between the dates of the bonds given for hire, and the date of the original contract, shews it was not understood *at that time*, that *Green* was to retain the possession. The bonds were given annually. The inference is, that a subsequent agreement for the hire of the slaves took place. The coincidence, between the amount of the hire, and the amount of the interest on the consideration money, is admitted. But where is the evidence that the hire was *inadequate?*

Green was a fraudulent character who attempted to carry away property, to which *Sadler was* entitled, whether it were by a mortgage, or by a conditional sale. Such a person is not entitled to presumptions in his favour.

But, admitting it was a mortgage, I contend that *Sadler's* right under the *execution* was good. Is the slave purchased by another man at the same sale *now* redeemable? If not, why should those purchased by *Sadler* be liable to redemption? Mr. *Wickham's* position, that relief in equity is never barred by proceedings at law, is not true in many cases. For example, would the Court decree the specific execution of a covenant for land, in favour of a man who had been sued at law, and suffered judgment for breach of the contract? The case here equally proves the position to be too general, and not universally true.

But it is said that *Sadler* was a trustee, and purchased subject to the trust. Every part of this proposition is erroneous. *Sadler* was not a *trustee.* Even if he was a *mortgagee*, the characters are very different. The purchase was not made under the mortgage or trust, but in a distinct right. The rule that a trustee purchases subject to the trust, (laid down in *Whichcote* v. *Laurence*, 3 *Ves.* jun. 740.)

applies only to trustees for the purpose of selling; and even such trustees may purchase, being accountable for profits made by them. *Ibid.* 750. But here the *Sheriff*, and not *Sadler*, was the trustee for selling.

The act of limitations does apply, though not specially pleaded. I draw this inference from *Newby's Administrator* v. *Blakey*. The rule is, that "*equitas sequitur legem*;" and, wherever the act cannot be availed of *at law*, without pleading, the course is the same *in equity*.(a) Since, then, *in detinue*, it is not necessary to plead the act, there is no reason for requiring it to be pleaded to *a bill in equity* brought for a similar purpose, viz. to recover slaves.

(a) 2 *Ves.* jun. 83. *Edsel* v. *Buchanan.*

Monday, May 22.

Judge TUCKER. The bill states, that *Green*, being indebted to *Sadler*, on the 7th of *March*, 1788, executed a deed to him for six negroes, to secure the payment of the debt, and that *Sadler* executed at the same time a defeasance, whereby he agreed that, on payment of 126*l.* 11*s.* (the debt before mentioned,) in three years, the right of *Sadler* to the slaves should cease. That *Green* was to keep possession of the slaves, paying interest on his debt, for which *Green* at different times gave his notes, under the name of hire, for the slaves. That *Green* being absent from his home for a short time on business, in *December*, 1789, *Sadler* took out an attachment against his estate, which was levied on these negroes; judgment in the attachment suit was obtained against *Green*, and the slaves sold under an execution issued upon that judgment; and that they were all purchased by *Sadler*, for 159*l.* The object of the bill is to set aside the sale, and redeem the negroes.

The defendants admit that *Green* was indebted to *Sadler* at the time he executed the bill of sale, which they insist was an absolute conveyance and transfer of the property both at law and in equity. They then proceed to state, by way of defensive allegation, that *Green*, before suing out the attachment, had absolutely absconded, and was on

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board a vessel with the negroes, and other effects, six miles from his home, when he was overtaken by the Deputy Sheriff, in a calm, who levied the attachment on the slaves. This fact is proved by the testimony of two witnesses; one of whom (the Deputy Sheriff) says, that *Green*, after some conversation, observed that, if there had not been an unlucky calm, he should have been far enough out of reach, and thinks he said he should have been in *Carolina*. That the bill of sale given by *Green* for the negroes, was intended only as a security for his debt to *Sadler*, and not as an absolute conveyance, or even a conditional sale, is, I think, obvious, not only from the papers themselves, but from the admission in the answers, that there was a *previous debt* due from *Green* to *Sadler*, which distinguishes it from the case of *Chapman* v. *Turner*,(*a*) and brings it within those of *Ross* v. *Norvell*,(*b*) and *Robertson* v. *Campbell* and *Wheeler*.(*c*) I consider the original transaction between the parties, therefore, merely as a mortgage; and I hold that, if a creditor by bond, or other legal right which he is enabled to prosecute with effect at law, obtains from his debtor a mortgage by way of security for the same, and then prosecutes a suit at common law, and having obtained a judgment for his debt, levies the execution upon the mortgaged property, which is sold by the Sheriff, and purchased by the creditor, the *debtor's* right to redeem is not extinguished by this proceeding at law, but his equity of redemption continues as fully and completely as before the execution was levied, or the judgment obtained. And this upon principle; for the creditor having accepted of the security for his debt, is bound by every condition that a Court of Equity might impose upon him; nor can he by his own act absolve himself from any such equitable obligation. The case of Lord *Cranstown* v. *Johnson*,(*d*) is a much stronger case than the one I have put; and shews that a creditor purchasing property, sold under execution to pay his own debt, may, under circumstances, be considered as holding

(*a*) 1 *Call*, 280.
(*b*) 1 *Wash.* 14.
(*c*) 2 *Call*, 424.
(*d*) 3 *Ves. jun.* 170.

the same only as a security for his debt, and the charges he has been put to. But there are several features in this transaction which give to this particular case a very different complexion. *Green* is proved to have absconded fraudulently, with his family and property, among which were all, or a considerable part of these slaves, and had actually embarked on board a vessel, and proceeded some distance on his way to another State, or some other quarter of this State, where he could conceal himself and his property from the very creditor to whom he had pledged it as a security. One of the soundest maxims of equity is, "that "he who hath committed iniquity, shall not have equi- "ty ;"(*a*) that is, as is explained by *Fonblanque*, b. 1. c. 2. s. 13. note (*p*), where such person is (as in the present case) plaintiff. *Willingham* v. *Joyce*(*b*) is not so strong a case as this ; for here the present plaintiff did all in his power to defraud his creditor. The latter was driven to seek his redress at law : whether the proceedings in the cause were regular or erroneous, cannot be inquired into in a collateral way. The judgment must be taken to be right, the sale lawful, and the purchase by the creditor the same as the purchase by any other person. The fraud of *Green* has utterly deprived him of the aid of a Court of Equity, which ought never to interpose to deprive a fair creditor, as *Sadler* was, of a legal advantage, gained in a due course of law, in consequence of a most flagrant attempt on the part of the debtor to defraud him. The staleness of the claim, postponed till after *Sadler's* death, and barred at law by the act of limitations, furnishes additional reasons in support of this opinion.

(*a*) *Francis's Max.* 8.

(*b*) 5 *Ves. jun.* 168.

I am, therefore, of opinion, that the decree be reversed, and the bill dismissed.

Judge ROANE. There is no doubt but that the agreement of *March* 7th, 1788, taken in connection with the defeasance, and all the circumstances of the case, imported a *mortgage*, and not an absolute sale of the slaves in

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question. The general right of a mortgagor to redeem may be waived, however, or the party may come into Court, asserting it under circumstances so unfavourable, that the door of the Court of Equity may be shut against him. The appellee's conduct, in the case before us, partakes of this latter character, and was clearly fraudulent and iniquitous; but I am not entirely prepared to say, that on this ground *alone* we ought to deny relief. There is one circumstance, however, which turns the scale with me, and that is, that it is neither alleged nor proved that the slaves in question were sold for LESS than their value, and it is also shewn that the surplus of the proceeds was applied to the benefit of the appellee by his consent and direction. I consider this, therefore, as a ratification of the sale; and as the appellee (taking the sale to have been for *full* value) is, perhaps, substantially in the same situation as if the negroes had been sold under the mortgage and the surplus paid over to him; I am of opinion, on these two grounds, (but principally the last,) to reverse the decree and dismiss the bill.

Judge FLEMING. I have not a doubt but the deed or bill of sale for the negroes, with the defeasance under the hand and seal of *Sadler*, (though on a separate paper,) was intended merely to secure the debt of 126*l.* 11*s.* with interest, and ought to be considered, in all respects, to have the operation of a mortgage; and had *Green* conducted himself with honesty and propriety, there can be no question but he would have been entitled to his equity of redemption of the mortgaged negroes, of which he would have been quieted in the possession, on his paying the original debt, with legal interest; but, when we see him fraudulently attempting to defeat not only *Sadler*, but his other creditors also, of their just claims against him, by endeavouring, clandestinely, to remove, as well the mortgaged negroes, as his other property, out of the reach of the law, and prevented only by the fortuitous circumstance

of a calm, he has, in my conception, forfeited all pretension to the aid or countenance of a Court of Equity; and I do not recollect a case where the rule more forcibly applies, than in the present, that he who comes into a Court of Equity to ask relief, ought to shew that his own conduct has been upright, equitable, and pure. I therefore concur in opinion with the other judges, that the decree is erroneous, and ought to be reversed, and the bill dismissed with costs.

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Duval *against* Bibb;

Thursday, May 18th.

THE appellee preferred his bill in Chancery against *William Duval* and *Pleasant Younghusband*, and obtained an injunction to the judgment of this Court rendered in an action of ejectment between *William Duval* and himself, which case is reported in 3 *Call*, 362.

The bill suggested that, in *October*, 1788, the complainant agreed to sell to *Francis Graves*, deceased, *then in high credit*, the lands in question, for 200*l.* payable *September*, 1789, three negro girls, and one-half of two entries for lands in *Kentucky*, to which *E.* and *T. Waltons* had been entitled, and for the conveyance of which they

1. A *bona fide* mortgagee of a tract of land, without notice of any equitable *lien* in the original vendor, (of whom the mortgagor purchased,) is well authorized to purchase of the mortgagor a release of the equity of redemption, (even after notice from the vendor,) in consideration of any just claim of his upon the mortgagor, originating before such notice; but, after notice, the *lien* attaches, for so much as he may have actually paid, or agreed to pay, for such release, over and above the claims for which the mortgage was taken, and which originated before the notice.

2. A vendor, having conveyed a tract of land by an absolute deed of bargain and sale, in which, and by a receipt at the foot whereof, he acknowledged that the consideration expressed was fully paid, having, nevertheless, taken the vendee's bonds for the amount thereof, and continued to live on the land, by virtue of a parol agreement, that he should retain possession until the contract on the part of the vendee should be fully complied with, retained an equitable *lien* on the land against a purchaser from the vendee having *actual* notice of such agreement.

3. In *equity*, either party to a deed may aver and prove against the other, or against a purchaser with notice, the true consideration on which the deed was founded, though a different consideration be mentioned therein; but a *bona fide* purchaser, without notice of the existence of such consideration, is not to be affected thereby.

4. The vendee, or his legal representatives, ought to be parties to a suit in Chancery, brought by the vendor against a subsequent purchaser, to recover a balance alleged to be due from the vendee.

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had given a bond which had been assigned to *Graves* without recourse; that, *relying on the punctuality of Graves, he accepted his bonds* for the money and negroes, and an assignment of the bond of the *Waltons* for the *Kentucky* lands; that, being pressed by *Graves* to make a deed for the lands sold him, he refused to do so, but upon the express condition that he should retain the possession until paid the money and negroes, and until he should receive a proper deed for the *Kentucky* lands, to which *Graves* assented, and thereupon he executed a deed to *Graves*, *Dec.* 13th, 1788, and has retained possession ever since, having received only a partial payment of money, and one negro, but no deed whatsoever for the *Kentucky* lands, which are absolutely lost; that some time after (but when he does not remember) he had a conversation with *Duval*, at *Thomas Johnson's* house, in *Louisa*, concerning the purchase and agreement with *Graves*; when he informed *Duval* of all the circumstances above stated, and *that he should retain the possession* of the land, until *Graves* should comply with the conditions before mentioned; that *Duval*, being asked by *Johnson* whether he had purchased the land from *Graves*, answered that *he had not*; that, notwithstanding this, *Duval* had brought an ejectment, and relied on a deed from *Graves*, dated in 1793, which was not executed until after the information given him as aforesaid, *Graves* being then sunk in credit, and, as the complainant believes, ruined in his affairs, and the deed obtained from him by *Duval* being as an indemnity against suretyships for him.

Duval's answer stated that, previously to the conversation at *Johnson's*, the respondent had a mortgage on the lands; that he then told the complainant of it, and that he intended to *purchase* the land of *Graves*, for himself and *Isaac Younghusband*, to *indemnify* themselves as his *securities*; upon which the complainant said, that *Graves* owed him money, but, if *Duval* would pay him, he could remove from the land the next fall; that the respondent was surprised, after *knowing Bibb had lived on the land from*

1789 *until that time*, that *Graves* should owe him any thing; that he told *Graves* what *Bibb* had said, whereupon he declared that he owed him nothing in his opinion, &c. *Pleasant Younghusband* (who was made a party as heir of *Isaac Younghusband*) never answered the bill.

Several depositions went to prove the *original* agreement between *Bibb* and *Graves* to have been nearly as stated in the bill; but there were none at all to shew that *Duval* had any *notice* thereof, until the conversation between him and *Bibb* at *Johnson's* house, which some of the witnesses supposed to have happened in 1795, but which, from the answer, it seems probable happened before the 28th of *November*, 1793, the date of *Graves's* deed to him and *Younghusband*.

Among the exhibits were, 1. An absolute deed of bargain and sale, for the land in question, from *Bibb* and his wife to *Graves*, and his heirs and assigns for ever, in consideration of 1,000*l.* in hand paid, the receipt whereof is acknowledged in the deed, and a *separate receipt* for the same, written and signed at the foot of the deed, with a covenant of warranty to *Graves* and his heirs, dated *December* 13th, 1788, and proved and admitted to record in the General Court on the 15th and 16th days of the same month. 2. A deed of bargain and sale from *Graves* to *Duval*, for the same lands, in fee-simple, with a proviso, "that whenever the said *Francis Graves*, his heirs or assigns, shall indemnify and keep harmless the said *William Duval*, respecting certain premises, (noticed in the former part of the deed,) or shall make or cause to be made to the said *William*, his heirs or assigns, a good, sure, and indefeasible estate in fee-simple, of, in, and to the premises, free from all incumbrances and necessary charges at law, then that *mortgage* shall be null and void, otherwise to be and remain in full force, power and virtue." Dated *February* 11th, 1790, and proved and admitted to record in the General Court the 14th of *June* following. 3. A deed of bargain and sale from

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Graves and wife to *Duval* and *Younghusband*, (in consideration of 600*l.* to them in hand paid, and for which there is also a separate receipt,) in fee-simple, with a clause of warranty, bearing date *November* 28th, 1793, and recorded in the General Court, *June* 17th, 1794. 4. The bond of *E. & T. Waltons*, for a conveyance of the *Kentucky* lands, assigned by *Swann* to *Graves* "*without recourse*;" and by *Graves* to *Bibb*, in general terms, *October* 13th, 1788, (which, it seems, was never complied with, nor put in suit.) 5. *Graves's* bond to *Bibb* for 200*l.* dated *December* 13th, 1788, payable *September* 1st, 1789; and, 6. *Graves's* bond to the same, (of the same date,) in the penalty of 250*l.* for the delivery of three negro girls, on or before the 1st day of *April*, 1789.

The Chancellor made a decree, (*in substance*,) giving the plaintiff his choice either to *pay* to the defendants so much of the consideration money as he had received of *Graves*, deducting therefrom his costs in this suit, (whereupon the defendants were to make him a deed for the land with a warranty against all their own acts in prejudice of the title,) or to *receive* from them the balance due of the said consideration money, (without allowing any credit for *Kentucky* lands,) such balance being ascertained by an account to be taken by one of the Commissioners of the Court; and, if the defendant should fail to pay what should be found due upon such account, within six months after it should be approved and confirmed, that the land in dispute should be sold for ready money by Commissioners, who should pay to the *plaintiff* what should appear to be so due, and to the *defendants*, the residue of the proceeds of the sale, after deducting the expenses thereof; reserving to *Pleasant Younghusband* liberty of shewing cause within months against the said decree.

From this decree the defendant *Duval* appealed.

Warden, for the appellant. The decree ought to be reversed. 1st. Because the deed from *Bibb* and wife to *Graves*, states a different consideration from that mention-

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ed in the bill to have been given for the land, and admits the whole thereof (as well in itself as by the receipt thereto annexed) to have been fully paid. *Ars Clericalis*, 391. and 2 *Dyer*, 169. *a.* *Wilkes* v. *Leuson*, shew that neither the *bargainor*, nor his heir, can aver that his deed was made on a different consideration from that expressed therein. He has not a right to set up any thing in opposition to his own deed, because otherwise purchasers would be entrapped. The deed, with the receipt in full, having been recorded, *Duval*, when he purchased of *Graves*, had no reason to expect that the consideration money, or any part thereof, had not been paid. The parol agreement that *Bibb* should remain in possession notwithstanding the deed, was of no effect. The statute executes a deed of bargain and sale, where to the bargainee's use, and conveys the possession.(*a*) The word "*grant*," made the land pass by way of use, and there was no need of actual entry.(*b*) *Graves*, therefore, was in possession by virtue of the deed; and, as he never reconveyed the land, *Bibb* could not be considered, *legally*, as in possession.

(*a*) 2 *Mod.* 253. *Baker* v. *Kent.*
(*b*) *Shep. Touchs.* 221. 223. *Cro. Jac.* 604.

2. No notice that any part of the purchase-money was due, is proved to have been given to *Duval*, or to *Isaac*, or *Pleasant Younghusband*, until the year 1795, which was after the date and recording of the last deed from *Graves*.

3. There was no necessity of such an account as the decree directed; but, if it was to be taken, credit should have been allowed to *Graves* for the value of the *Kentucky* lands, for which the appellee had accepted the bond of *Edward* and *Thomas Waltons*. It is true the assignment of that bond by *Graves* was not "*without recourse*;" but the deposition of *John Poindexter*, who drew the writings, proves that he so understood the intention of the parties. Besides, if *Graves* were ultimately responsible for those lands, *Bibb* ought to have used due diligence in endeavouring to recover of the *Waltons*, before he could look to *Graves*; yet he has never brought suit on that bond, though so many years have elapsed since its date. But, at

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any rate, *Duval*, the *bona fide* purchaser of the *Louisa* land, ought, in no event, to be liable for the default of the *Waltons*, or of *Graves*.

4. The legal representatives of *Graves* ought to have been made parties; a balance being alleged to be due from *him*, and an account directed to be taken, which could not be rendered by *Duval*. *Graves's* representatives are interested on his warranty to *Duval*, and, at law, would have been called in as *vouchees*. It is a rule in equity, that all persons interested should be made parties. *Mitf.* 39. *Ibid.* 144.

Randolph, for the appellee. There can be no doubt, after the case of *Eppes*, &c. v. *Randolph*,(a) that a different consideration from that mentioned in the deed, may be averred and proved. Mr. *Warden* is mistaken in saying that *Duval* had no notice. It appears from his own answer, that he had notice before the last deed from *Graves* to him; and this notice binds him to the same extent, and in the same manner, as *Graves* was bound. *Sug. L. Vendors*, 484. The previous mortgage was of no consequence, for that was for indemnity only, and there is no proof that the indemnity was required. The evidence clearly proves, that *Bibb* was to retain possession of the land, until the contract on the part of *Graves* should be *fully complied with*, and that he actually did retain it, which in itself was sufficient. It is said that *Walton's* land was taken by *Bibb at all risks*; but the nature of the transaction precludes the idea. The bond was assigned by *Swann* to *Graves* "*without recourse*;" but from *Graves* to *Bibb in general terms*. It cannot be believed, then, that *Bibb* meant to take the land without the warranty of *Graves*. Let it be considered, too, that *Bibb* was selling himself out of house and home; and it would have been insanity in him to part with his own land, without any security for a good title to that which he took in its stead. The testimony of *John Poindexter* is only as to his "*apprehensions*,"

(a) 2 *Call*, 125.

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in which he might have been mistaken; and even *he* admits that *Graves* was to see that the *Waltons* made a deed. He never did see to it, and the land is actually lost, as appears from the deposition of *Edward Walton* himself, who swears that other persons now hold it by prior titles.

As to the want of proper parties, the case of *Brace* v. *Harrington*(*a*) furnishes the general reasoning on the subject. *Collins* v. *Griffith*(*b*) is strongly in our favour, shewing, that where there are two joint and several obligors in a bond, and one dies, the executor of the deceased may be sued in equity, without making the surviving obligor a party; and that in such case it is incumbent on the *defendant* to compel the other obligor to contribute towards payment of the debt. So here, if any contribution is to be demanded of *Graves's* representatives, *Duval* must sue them for that purpose. But he has taken on himself the defence, and has not suggested the propriety of calling on them for contribution.

(*a*) 2 *Atk.* 235.
(*b*) 2 *P. Wms.* 313.

Wyatt's Prac. Reg. 302. 314. and 3 *P. Wms.* 97. note [A], also, by analogy, support the doctrine I contend for. In note [I], to 3 *P. Wms.* 311. it is said to be a general rule, that no one need be made a party against whom the plaintiff can have no decree. Neither was it necessary to make *Graves's* representatives parties, in order to get evidence from them, because it might have been obtained in the ordinary way, by taking their depositions.

Thursday, June 1. The Judges pronounced their opinions.

Judge TUCKER, after stating the case, said, the first question which I shall consider is, whether a purchaser, for a valuable consideration of lands, for which the seller has an *absolute* conveyance in fee-simple duly proved and recorded, and the consideration for such a conveyance also acknowledged to have been fully received, can be affected by any latent equity which the first seller may have.

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against the second, or by any *condition* touching the original sale, from the first seller to the second, which is not expressed in the deed itself?

This question seems to be fully answered by the President of this Court in the case of *Wilcox* v. *Calloway*,(a) where, in delivering the opinion of the Court, he says, "The rule *caveat emptor* applies only to purchasers of de- "fective *legal* titles. A *purchaser* of the *legal* title is not "to be affected by any *latent* equity, whether founded on "trust, fraud, or *otherwise*, of which he has not *actual no-* "*tice*, or which does not *appear in some deed* NECESSARY "*in the deduction of the title*, so as to amount to construc- "tive notice."

(a) 1 *Wash.* 41.

Duval then could not be affected by any latent equity, or *secret condition*, between *Bibb* and *Graves*, which is not expressed in the deed itself. The mortgage of the 11th of *February*, 1790, therefore stands unimpeached, both at law and in equity, since he had neither *actual* notice of *Bibb's* private agreement, nor is there any thing in *Bibb's* deed to *Graves*, that could have led him to *further inquiry*. On the contrary, the information to be collected from it was conclusive, in *favour* of a purchaser; otherwise, the laws which direct the recording of all deeds of lands must prove a snare, instead of a security to purchasers.

The deed of *February* 11th, 1790, is to all intents and purposes an absolute conveyance in fee-simple, at law. The proviso is in the nature of a condition subsequent. The object of the deed is the perpetual security and indemnity of *Duval*, against a recovery which might be had against him by *Currie* or his heirs. Equity cannot deprive him of that security; and, so long as he may by possibility be exposed to the danger of a recovery, his estate at law remains absolute. Any future conveyance from *Graves* to him could only operate by way of a *release of his equity of redemption*; for *Graves* had nothing else left in himself. If, upon the faith of such a release, he advanced money to *Graves*, or became security for him in any of his pecuniary transactions, his *legal right* would at-

tach thereto an *equitable* priority against any other *equitable claim*, especially if his engagements, as security for *Graves*, were actually prior to *actual notice* of such *latent* claims. If a third mortgagee can, by purchasing the first mortgage, attach a priority to his own over the second, by thus acquiring the prior legal title, and the union of his own mortgage with it, will not the same reason apply more forcibly in *Duval's favour?* He therefore had a right to a *perfect indemnity*, not only from the events intended to be provided against in the mortgage of *February* 11, 1790, but from all other damages which he may have incurred, or still be exposed to, from his suretyships for *Graves*; nor could a Court of Equity deprive him of either. Why, then, might he not commute a contract for *future indemnity*, into one for *present indemnity*, by taking a release of *Graves's equity of redemption* of the lands, the *legal* title of which was already vested in himself?

According to the decision of this Court in *Eppes* v. *Randolph*,(a) *Duval*, as a *purchaser for a valuable consideration*, is at liberty to aver and prove the *real consideration paid or agreed on*, between himself and *Younghusband* on the one part, and *Graves* on the other, for the lands, as conveyed by the deed of *November* 28, 1793. He states that they had become bound as securities for *Graves* to *William Alexander & Co.* The amount of that suretyship, and the time when it was undertaken by them, are therefore, it may be presumed, susceptible of proof. Nor must the security intended by the mortgage in *February*, 1790, be lost sight of, if it can be proved that it entered into the view of the parties, when contracting for the absolute sale of the lands: *Duval's* equity must, therefore, prevail over *Bibb's*, as far as these matters extend. But, for any *actual payments* made by *Duval* to *Graves*, posterior to the information which the former received from *Bibb* at the house of *Johnson*, (if any such were made,) I think *Bibb* is fairly entitled to recover the amount thereof, with interest, towards the satisfaction of his claim against

(a) 2 *Call*, 185.

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Graves for any part of the purchase-money of the land which may still remain due to him from *Graves*, but nothing more.

I am, therefore, of opinion, that the Chancellor's decree be reversed, and the cause remanded for an account to be taken of any actual *payments* which may have been made by *Duval* to *Graves*, subsequent to the *notice received* at *Johnson's* house, &c. That an account of the balance due from *Graves* to *Bibb*, upon his bonds of the 13th of *December*, 1788, for 200*l.* and for the three negroes, if any, upon a full settlement of all accounts between those parties, (except as to the *Kentucky* lands, for which *Bibb* appears to have taken an assignment of the *Waltons'* bonds, without any agreement on the part of *Graves* to be responsible, in case the lands were lost,) ought to be taken; and for that purpose the personal representatives of *Graves* ought to be made parties to the suit; that *Duval* be considered liable for any *actual balance* due from him to *Graves*, as also for any *actual payments* made by him to *Graves* since the time of *Duval's* receiving *notice* of *Bibb's* equity, as before mentioned; and that the cause be sent back with directions accordingly.

Judges ROANE and FLEMING agreed that the decree be reversed; and the following was entered as the unanimous opinion of the Court: "The Court having maturely considered, &c. is of opinion that the said decree is erroneous in this; that the appellant, *William Duval*, having obtained from *Francis Graves*, before he had notice of any equitable claim which the appellee, *Robert Fleming Bibb*, might have on the lands sold by him to the said *Graves*, a conveyance in fee-simple, by way of mortgage, as a security against certain contingent damages to which the said appellant might be exposed from a claim of *James Currie* to the houses and lots, before that time sold and conveyed by the said *Graves* to the said appellant, and having, as he hath alleged in his answer, like-

" wise become bound, together with a certain *Isaac Young-*
" *husband* as a security to *William Alexander & Co.*
" for a considerable sum of money, before notice as
" before mentioned, was well authorized to purchase the
" release of the equity of redemption of the said mortgage,
" notwithstanding such notice afterwards received; and
" to avail himself of the consideration in his favour arising
" out of the preceding circumstances, being responsible
" only for so much of the purchase-money as he may either
" have actually paid to the said *Graves*, or have agreed to
" pay to him, over and above the before-mentioned consi-
" derations of indemnity; therefore, it is decreed and or-
" dered, that the said decree be reversed and annulled, and
" that the appellee pay to the appellant his costs by him ex-
" pended in the prosecution of his appeal aforesaid here.
" And this Court proceeding to make such decree as the
" said Superior Court of Chancery ought to have render-
" ed, it is further decreed and ordered, that an account be
" taken before one of the Master Commissioners of the
" said Court, of all sums of money, if any, actually paid
" to the said *Graves* by the said appellant, since the notice
" proved to have been given him at the house of *Thomas*
" *Johnson*, in the county of *Louisa*, or which may be still
" due from him to the said *Graves*, or to his representa-
" tives, as a further consideration for the purchase of the
" release of the equity of redemption, beyond the indem-
" nities before mentioned, and also an account of the pur-
" chase-money due from the said *Graves* to the appellee, ex-
" clusive of the *Kentucky* lands, for which this Court is of
" opinion the said *Duval* was not responsible; and, for the
" purpose of taking such last-mentioned account, the re-
" presentatives of the said *Graves* are to be made parties
" to this suit, and that the account so to be taken be re-
" ported to the said Superior Court of Chancery; and if,
" upon such report, there shall appear any money due from
" the said *Graves* to the appellee, on account of the pur-
" chase aforesaid, the appellant, *Duval*, ought to be, and

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" is hereby made responsible for so much thereof as it may " appear that he hath paid, or agreed to pay to the said " *Graves*, since the notice before mentioned, with interest " on the same, and no more; and, on payment thereof by " the appellant to the said appellee, *Robert F. Bibb*, that " he, by a good and sufficient deed, at the costs and " charges of the said appellant, release unto him all his right " and title both in law and equity to the said land and pre- " mises, and deliver quiet and peaceable possession thereof " to the said appellant; and if the said appellant shall fail " to pay to the said appellee whatever sum of money may " appear to be due on such report of the Commissioner, " with interest as aforesaid, within a certain time to be li- " mited by the said Superior Court of Chancery, that then " the said *Louisa* land, or so much thereof as will be suf- " ficient, be sold by Commissioners to be appointed by the " said Court for that purpose, at public auction, for ready " money, after the time and place of sale shall have been " noticed for four weeks successively in two of the *Rich-* " *mond* newspapers; and, out of the money arising from " the sale, the said Commissioners pay to the said appellee, " or to his assigns, whatever sum of money shall, by the " report of the Commissioner of the said Court, appear to " be due, with interest as aforesaid, and the residue of the " product of the sale, if any, after deducting the consequent " expenses thereof, pay to the said appellant, and report " their proceedings in execution of the same to the said " Superior Court of Chancery, in order to a final decree."

Cause remanded to the Court of Chancery for further proceedings, according to the principles of this decree.

Dogan *against* Seekright, Lessee of Landon Carter.

Wednesday, May 24.

THIS was an action of ejectment brought by the appellee against the appellant in the District Court. At the trial a bill of exceptions was signed and sealed, disclosing the following matter.

The lessor of the plaintiff offered in evidence, 1st. A patent, dated in 1724, to *Landon Carter*, *George Carter*, *Lewis Burwell*, *Carter Burwell*, *Robert Burwell*, *Mann Page*, and *Carter Page*, for 41,660 acres of land; 2d. A record from the General Court of the proceedings in a suit in Chancery instituted in 1738, by *Landon Carter* against the other patentees, for partition of that land; from which it appeared that partition was made by Commissioners appointed for that purpose, (the surveyor attending,) by certain *metes and bounds*, according to a plat returned to the Court, which partition the Court confirmed. The plat returned by *John Grant*, the surveyor, under date of *October* 3d, 1739, exhibited the area of the whole tract to contain 38,553 acres. According to an explanation of his, accompanying the plat, the dividing line M. C. between *Landon Carter's* lot, and *Mann Page's* and *George Carter's* lots, began "at a white oak, marked R. C. near *John Young's* "plantation, being a *corner* tree of the patent, and ended "at another white oak on *Piney Branch*, another *corner* "of the patent;" and the dividing line I. P. between *Mann Page's* lot, and *Lewis Burwell's* and *George Carter's* lots, "began at a white oak marked R. C. on a high bank of the "south branch of *Bull Run*, and ended *at a white oak near* "*Bull Run, in the line M. C. on a stony hill.*"

The lessor of the plaintiff moreover exhibited the will of *Landon Carter*, one of the said patentees, duly recorded on the 1st of *February*, 1779, in which he devised the part allotted to him to his sons, *Landon* and *John Carter*, (of whom *Landon* was the lessor of the plaintiff,) and

1. Natural or reputed boundaries, or lines of marked trees, ought to be established, in preference to mere course and distance, or to mistaken descriptions in surveys or conveyances.

2. It seems to be matter of *law*, on which the Court, if either party require it, should instruct the Jury, that a *marked* line shall prevail over one *which was never marked*.

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moreover proved that, if the line A. P. described in the plat of a survey by *Charles Kemper*, made in this cause by an order of Court, (corresponding with the line M. C. in the division plat,) were established, it would include the lands for which this ejectment was brought, which then would fall within the bounds of the land devised to him.

On the part of the defendant, proof was offered and admitted, that *Grant*, the surveyor aforesaid, ran a line in the woods from an oak marked L. C. (in a line of the patent,) represented by red *a* in another plat of a survey, by *Henry D. Hooe*, also made in this cause by an order of Court, to a white oak, represented by red *c*, *near Bull Run, on a stony hill;* that the said *Grant* also ran a line from the last mentioned oak *to the white oak marked R. C. on the high bank of the south branch of Bull Run*, as mentioned in the report to the General Court as aforesaid; that the two lines so run in the woods were plainly and distinctly marked and cornered; that the other division lines represented in the plat from the General Court, were run and marked in the woods by the same tool that marked the two lines last particularly described; and that no lines were proved to have been run in the woods, or trees marked therein by the said surveyor, or by the Commissioners of the General Court, to divide the land of *Mann Page* from the land of *Landon Carter*, besides the lines aforesaid; that, at the intersection of the last-mentioned line, from the white oak on the stony hill to the white oak marked R. C. on the bank of *Bull Run*, with a line designated by black *a d*, on *Edward D. Hooe's* plat, (corresponding with the line M. C. in *Grant's* plat, and with the line A. P. in *Kemper's* plat,) there was no corner or place in any manner answering the description of a stony hill near *Bull Run;* and that there was *no marked line tree* on the said last-mentioned line.

Evidence was further exhibited to prove that *Mann Page*, (under whom the defendant claims and holds,) in the year 1764, employed on his lot an overseer, who always from thenceforth claimed up to the lines, from the

L. C. tree aforesaid to the stony hill, and from thence up to the white oak marked R. C. on the bank of *Bull Run*, and was watchful to prevent trespasses up to the said lines; that the claim and watchfulness aforesaid continued for more than twenty years, without claim or interruption from the said *Carters*, or others; but the land so claimed was during all that time in woods, uncleared and unsettled, and that the division lines run as aforesaid in the woods, have been uniformly the reputed dividing lines between *Mann Page* and *Landon Carter*, and between the said *Page* and *George Carter*, and the said *Page* and *Lewis Burwell*, until the lessor of the plaintiff set up his claim in 1794; that the land contained within the boundary lines of *Landon Carter's* lot, *as represented on Grant's plat*, was larger by 1075 acres, and of greater value, one acre with another, than the land contained in *Mann Page's* lot on the same plat; that the stony hill aforesaid is more than 100 poles distant from the line represented on *Hooe's* plat by black *a d;* that the lessor of the plaintiff acknowledged, that he believed that the L. C. tree aforesaid was the corner tree of the dividing lines aforesaid between *Mann Page* and *Landon Carter;* that *Landon Carter* (the lessor of the plaintiff) and *John Carter*, devisees of *Landon Carter*, deceased, in their division of his lot between them, cornered their dividing line at a tree, in the line from the tree marked L. C. to the stony hill, without running into the land in controversy; that *Robert Carter* and *Wormeley Carter*, in the year 1797, took a lease from the defendant of part of the land in controversy; and that one of the lines of the said lease was bounded by the last mentioned line; that *Landon Carter*, the lessor of the plaintiff, was then alive, and until 1801; and that *Wormeley Carter* never had right to the said land in the life-time of the said *Landon Carter*.

The question between the parties was, whether the *marked* lines described as aforesaid should be established, or the line M. C. laid down in *Grant's* plat; the land in

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controversy being comprehended within part of that line, part of the patent line, and the two *marked* dividing lines.

The Court instructed the Jury, that, "if they were satisfied from the evidence, that the plaintiff's beginning, "in the survey in this cause made by *Kemper*, at A. was "at the same corner of the patent described by *John Grant* "at the point marked M. in the said *Grant's* survey, and "that the termination of that line at P. so run by the plaintiff "in the survey made in this cause, was at the corner descri-"bed in the said *Grant's* survey, as represented by the let-"ter C. *the line so run by the plaintiff in the survey in "this cause should be by them considered as the true di-"viding line between the parties;* the Court considering "the line expressed in the decree of the General Court to "constitute the legal division between *Landon Carter*, an-"cestor of the lessor of the plaintiff, and *Mann Page*, "under whom the defendant claims." To which instruction the defendant by his counsel excepted, and (a verdict being found, and judgment rendered for the plaintiff) appealed to this Court.

Botts and *Williams*, for the appellant, observed, that so much of the instruction to the Jury as was hypothetical, was unexceptionable, since it affirmed nothing; but the operative part of the instruction, which ought not to have been given, was, that the line so run by the plaintiff in the survey in this cause, should be considered as the true dividing line. The concluding part implies a misconception of the question presented by the record, since it only imports an opinion that the line *expressed in the decree* of the General Court was established, (a point not disputed,) whereas the question was, *which* of the conflicting lines "expressed," or, rather, comprehended in the decree, should be established; and this question ought to have been decided in favour of the *marked* and *reputed* lines, according to *Shaw* v. *Clements*,(a) and *Baker* v. *Seekright*, *Lessee of Glasscock*.(b)

(a) 1 *Call*, 438.
(b) 1 *Hen. & Munf.* 178.

Wickham, contra. Whatever might have been the effect of this argument before the *Jury*, this Court have nothing to do with it. The instruction left the cause at large for the production of every argument which either party might think proper to urge to the Jury. The only point was, where did *Grant's* dividing line begin. The Court did not say where it began; but, wherever it did begin, it was admitted on all hands to be the true line. The Jury were to decide, and were left perfectly at liberty to take one line or the other. It would not have been proper for the Court to instruct the Jury, that the *marked* line should have been preferred; because this would have been giving an opinion on a matter of *fact*. It was a *circumstance* to be weighed by them, and they did weigh it; but it was counteracted by another circumstance, that *Grant* says he began at a *corner in the patent line*, and ended at a *corner*, whereas on the *marked* line there is no such corner.

In reply, it was said, it does not appear at whose instance this instruction was given; but this Court must inquire whether it was *legal* or not. The question whether the *marked* lines were to be preferred to a line *which never had been marked*, was a question of *law*, and the Court should have instructed the Jury to regard the marked lines in the first place.

But the Court did limit and mislead the Jury by this instruction; because it confined them in the conclusion to be drawn from the identity of the line A. P. run by *Kemper*, with the line M. C. *laid down in Grant's plat, but never run by him*. What right had the Court to say that, from such identity, it followed that *Kemper's* was the true dividing line? The conclusion was erroneous; because the *marked* line might, nevertheless, have been the true line intended by *Grant*, though by mistake he laid it down incorrectly in his *plat*, as appears from his own explanation annexed to it; according to which, the point of intersection between the lines M. C. and I. P. is said to have been

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at a white oak near Bull Run on a stony hill, when, in fact, the line M. C. as laid down in his plat, (corresponding with the line A. P. run by *Kemper*,) did not come within one hundred poles of that place.

Friday, June 2. The Judges pronounced their opinions.

Judge Tucker. There are certain principles which, in my opinion, ought to be always regarded by a Jury, in settling the boundaries mentioned in any grant, patent, or other deed, concerning lands in this country.(*a*) They arise from a variety of considerations; not only from the variations of the compass, but from old surveys being often very inaccurate; the plats returned being not unfrequently protractions upon paper, instead of the result of actual mensuration, and field notes, made upon the spot; lines not unfrequently left out, and the courses of others mistaken by copyists, so that every new conveyance may be the parent of new mistakes; whereas natural boundaries are, perhaps universally, invariable; and marked lines and trees, so long as they remain without destruction, or *wilful alteration*, in general furnish a safer guide than any other, except notorious land-marks established by the hands of nature. According to these principles, regard should always be had to the following circumstances.

(*a*) See 1 *Call*, 429. *Shaw* v. *Clements*. *Herbert* v. *Wise*, 3 *Call*, 239. 1 *Hen. & Munf.* 177. *Baker* v. *Glascock*.

1. If a patent or deed refer to any notorious land-marks, or natural boundaries, which cannot be mistaken, and are not liable to change *or decay*, as the corners or angles of a plat, such notorious land-marks are to be regarded as *termini*, from whence straight lines are to be run from one to the other, without regard to the correspondence of either course or distance, which may in such cases be mistaken in the deed.

2. If lines and corners be proved to have been actually run, and agreed on as a boundary between parties holding adjacent lands, those lines and corners are from thence-

forth to be regarded as the limits of the *possession* of each; and from the period of running such lines, if they continue to be acquiesced in, the acts of limitation may be considered as beginning to run, so as to control the courses and distances mentioned in the deed, by establishing an *adversary possession* in either party, according to the lines so run.

3. Where, in a grant or deed, courses and distances *only* are mentioned, beginning from a certain point, but not referring to any certain point for the termination, otherwise than by reference to the distance, according to the course prescribed; in such case, courses and distances, as expressed in the deed, are only to be regarded, unless an actual survey, *duly authorized*, be proved to have been subsequently made, according to the courses and *distances* prescribed by the deed.

4. Where courses and distances, with *marked lines* and *corners*, are referred to in a deed, in such case *lines* and *corners* corresponding *most nearly* with the *courses* and *distances*, lines and *corners* mentioned in the deed, are to be regarded as the *true* courses, &c.

5. If partition be made between two joint-tenants, or tenants in common of land by deed, or by virtue of a decree, if in the deed or decree it be expressed, that A. shall have all the lands which lie west of a line drawn from one notorious land-mark or natural boundary to another, and B. all that lie east thereof, although this line be never actually run, each is from thenceforth seised of his proper part, according to the *true* course to be run from one of those points to the other; but if a line be run and *marked*, by mutual consent or agreement, or by order of Court, and confirmed in the decree, and that decree be acquiesced in, the *possession* of EACH commences from that period, according to the *line so marked*, although that line be *over so erroneous*; and the act of limitations may operate upon that possession, so as to render *such erroneous line*, in process of time, the *legal boundary* between the parties.

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In the present case, the parties claim under a grant from the proprietors of the northern neck, to *Landon Carter* and five others, for about 40,000 acres of land, in the year 1724, whereof partition was made by a decree of the General Court, upon a bill filed, and consent of parties, in the year 1739. The commissioners, for that purpose appointed, made a report, with a survey annexed, made by *John Grant*, in which, among other things, they say that they have allotted to *Landon Carter*, under whom the plaintiff in the ejectment claims, the lot on the plat No. 1. separated (as by the plat appears) from the residue of the tract, by a straight line drawn from letter M. on the south side of the plat, to letter C. on the north side thereof, a distance above six miles, according to *Kemper's* plat. They describe this line as running north 3 deg. east, and beginning at a *white oak*, marked R. C. near *Young's* plantation, being a *corner tree* of the patent, and ending at another *white oak*, on *Piney Branch*, *another corner* of the patent.

To *Mann Page*, under whom the defendants claim, they allotted the lot No. 2, on the plat. Separated from the first lot, as described on the plat, by the line M. C. before mentioned; and from the third and fourth lots, by a line thus described: "The dividing line, I. P. N. 80 degrees "east, begins at a white oak, marked R. C. on a high "bank of the south branch of *Bull Run*, and ENDS at a "*white oak* NEAR BULL RUN, IN THE LINE M. C. ON A "STONY HILL," which is accordingly designated in that plat by the letter P. as in the STRAIGHT LINE between M. and C.

The point P. thus designated in the plat returned to the General Court, constitutes a CORNER between lot 1. and lot 2. and between lot 2. and lot 3. The report was confirmed, and a decree accordingly; the parties, therefore, became seised in severalty of their respective shares, according to the terms of that decree.

There are two plats of surveys made in this cause; in one of which, made by *Charles Kemper*, there is a straight line drawn from a point A. on the south side of the plat, to a point P. on the north side thereof, a distance of 1,944 poles, (or more than six miles,) without meeting a single marked tree in all that distancce, except one two miles or more from the lands in controversy, where, by the surveyor's report, he intersected a plain marked line, nearly at right angles (it would appear from the plat) with the line he was then running.

In the other plat, made by *Henry D. Hooe*, a similar line appears to have been run from the same points, the distance 1,925 poles, and not a line tree discovered in all that course. By direction of the defendant's attorney, the surveyor then began at a point marked little red *a*, 88 poles distant from the beginning of the first mentioned line, and nearly at right angles with it; and, having run the course designated on the plat by the red dotted line, *red a*, *red b*, at right angles therewith, and at the distance of eight poles eastward of that point, a STUMP at red *c* was shewn him, by two witnesses, *on a* STONY HILL, near the south branch of BULL RUN, which tree they said they knew when standing, and that it was marked with R. C. In running this line, it appears that, a little on the right hand thereof, designated by the red dotted line, red *a*, red *c*, they passed a large number of *ancient marked* trees. From the corner red C. to red F. there is a line of marked trees, corresponding pretty nearly with the dividing line, I. P. reversed in the plat, and report made to the General Court, in the year 1739.

The Court instructed the Jury, that if they were satisfied from the evidence, that the plaintiff's beginning in the survey made by *Kemper* at A. was at the same corner of the patent described by *John Grant*, (whose survey was made the foundation of the decree of the General Court,) at the point marked M. in that survey, and that the termination of that line at P. to run by the plat in *Kemper's* sur-

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vey, was at the corner described in *Grant's* survey, by the letter C. the line so run by the plat in the survey in this cause, should be considered as the true dividing line between the parties.

If there had been no evidence whatsoever in the cause, by which it had appeared that any line had ever been actually marked from one side of the patented lands to the other, in the direction, or nearly so, with the course laid down in *Grant's* survey, which was returned to the General Court, or if no such STONY HILL NEAR BULL RUN could be found, as that mentioned by the commissioners who made the division between the parties, to have been *in the line M. C.* in the plat returned by them to the General Court, this direction might have been correct. But the termination of the line I. P. (which constituted a CORNER, not only between the parties in this cause, but between the party under whom the defendant claims, and another joint-tenant, or tenant in common, under the original grant,) being expressly declared TO BE IN THE LINE M. C. and, moreover, to END at a *white* oak, near BULL RUN, and on A STONY HILL; *those* PERMANENT, NATURAL *land-marks* ought not to have been *overlooked* or disregarded by the Court in its instruction; neither ought regular lines of marked trees, leading to such a point, and there terminating from different directions, to have been overlooked or disregarded, especially if they should appear to have run in a manner corresponding in any reasonable degree (of which the Jury were to judge) with the lines expressed in *Grant's* survey, and made the basis of the decree of the General Court.

My opinion, therefore, is, that the judgment be reversed, and a new trial be had, with the following instruction: "That if, upon such new trial, any instruction to the Jury "be prayed by either party, the Court ought to instruct "the Jury that, if the Jury shall be satisfied from the evi-"dence which shall be before them, that the point little "red *c* in the plat made in this cause by *Henry D. Hooe*,

"surveyor of *Prince William* County, is the same "with the point P. *at a white oak* NEAR BULL "RUN, *in the line M. C.* ON A STONY HILL, (as de- "scribed in the plat and report made by *John Grant*, and "the commissioners appointed to make a division of the "lands comprised in a patent granted to *Landon Carter* "and five others, and returned to the General Court, in the "year 1739, by whom the same was confirmed and made "the basis of the decree for a division,) they ought to con- "sider that point as a *corner* between the parties, or those "under whom they claim, from which *corner* other lines, "corresponding with the courses mentioned in that plat "and report, ought (if necessary) to be drawn, by rever- "sing the courses of the line M. P. and I. P. in *Grant's* "survey respectively, unless the Jury shall from the evi- "dence be further satisfied, that an ancient line, corres- "ponding with the course M. C. in *Grant's* survey, has "been actually run and marked, from the point little red "*a* (or any other point on that side of the plat, as to the "Jury may appear) to the point little red *c*, in the said "*Hooe's* plat described, either by the said commissioners "appointed by the General Court as aforesaid, or by the "parties respectively under whom the present parties "claim, or their agents authorized for that purpose; in "which case (if no contravening evidence satisfactory to "the Jury be offered) they ought to establish the line so "proved to have been run and marked, as the true dividing "line between the parties."

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Judge ROANE. The question of boundary in this case, was emphatically proper for the consideration of the Jury; in deciding which they ought to have due regard to all the circumstances shewn in evidence in the cause, and, particularly, to marked lines and reputed boundaries. The cases of *Shaw* v. *Clements*,(a) *Herbert and wife* v. *Wise and others*,(b) and *Baker* v. *Seekright, Lessee of Glascock*,(c) in this Court, shew the sense of the Court in favour of marked and reputed boundaries, when in opposi-

(a) 1 *Call*, 429.
(b) 3 *Call*, 259.
(c) 1 *Hen. & Munf.* 177.

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tion to mistaken descriptions in deeds or surveys, or to mere course and distance. It is said in those cases that, in a conflict of the kind, the Juries have very wisely and generally, in this country, disregarded the latter, and adhered to the former *criteria*, as being more stable and permanent, and less liable to mistakes and misconception. Referring particularly to those cases for the doctrine I mean to adopt on the present occasion, it will be found that the decision in *Baker* v. *Seekright, Lessee of Glascock*, is perhaps a complete authority in opposition to the instruction of the District Court. In *that* case, parol evidence was admitted to establish a *marked* line, which did not correspond with that mentioned in the deed either as to course or distance. It was so admitted, on the ground that the description in the deed may have been *mistaken;* whereas the marked and reputed line, being more stable and permanent, ought to prevail, or, at least, be submitted without prejudice to the consideration of the Jury. So, in the case before us, it is very possible that the surveyor may have erred in his description of the two points beginning and ending the line in controversy; he may have mistaken this in the *figure* itself, and corrected it (as he *seems* to have done) in the notes or explanation attached to and made part of his report of the survey. So, also, this *possible* mistake may perhaps be shewn to have been corrected by him, by actually *running and marking* the line claimed by the appellant; at least, however, this is an inquiry proper for the consideration of the Jury.

But the instruction of the District Court does not admit the possibility of a mistake in this respect in the survey: it is imperious on the Jury, in the event of the two points in *Kemper's* survey being proved to correspond with *two* in *Grant's* survey. That instruction, therefore, omits to give to *marked* and *reputed* lines, their due weight with the Jury, according to the uniform decisions of this Court on the subject; it counts as nothing the various strong circumstances shewn in evidence by the appellant in favour of

his pretensions, but sets up as infallible, and as outweighing every thing else, a criterion not entitled under the decisions of this Court, or the usage of Juries in this country, to such preeminence. In fine, bottoming the instruction upon the mere proof of correspondence as aforesaid, it deprives the Jury of the right to go into the whole evidence, and to give their verdict upon a general consideration thereof.

Such being the character of this instruction, which may have misled the Jury, the verdict ought not to stand. On the new trial to be awarded, if any instruction at all is necessary to be given to the Jury, it should authorize them to take into consideration all the circumstances given in evidence in the cause, and especially the *reputed* and *marked* lines proved and relied upon by the appellant.

Judge FLEMING. There being no difference of opinion among the Judges as to the merits of the cause, the following is to be entered as the judgment of the Court:

"This Court is of opinion, that the instruction given "to the Jury by the District Court was erroneous; there- "fore it is considered that the said judgment be reversed, "&c. and it is ordered, that the Jury's verdict be set aside, "and that a new trial be had in the cause; and that, if "upon such trial, any instruction to the Jury be prayed by "either party, the instruction be, that if the Jury shall be "satisfied, from the evidence which shall be before them, "that the point, little red *c*, in the plat made in this cause "by *Henry D. Hooe*, surveyor of *Prince William* County, "is the same with the point P. at a white oak near *Bull* "*Run*, in the line M. C. on a stony hill, as described in the "plat and report, made by *John Grant* and the commis- "sioners appointed to make a division of the lands com- "prised in a patent granted to *Landon Carter* and five others, "and returned to the General Court in the year 1739, by "whom the same was confirmed and made the basis of the "decree for the division, they ought to consider that point "as a corner between the parties, or those under whom

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" they claim, from which corner, other lines correspond-
" ing with the courses mentioned in that plat and report,
" ought (if necessary) to be drawn by reversing the
" courses M. P. and I. P. in *Grant's* survey respectively,
" unless the Jury shall, from the evidence, be further sa-
" tisfied, that an ancient line, corresponding with the line
" M. C. in *Grant's* survey, has been actually run and mark-
" ed from the point little red *a*, (or any other point on that
" side of the plat, as to the Jury may appear,) to the point
" little red *c* in the said *Hooe's* plat described, either by the
" said Commissioners appointed by the General Court as
" aforesaid, or by the parties respectively under whom the
" present parties claim, or their agents authorized for that
" purpose, in which case, if no contravening evidence sa-
" tisfactory to the Jury be offered, they ought to establish
" the line so proved to have been run and marked as the
" true dividing line between the parties." Which is or-
dered to be certified, &c.

END OF APRIL TERM, 1809.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

At the Term commencing the first of October, 1809.

IN THE THIRTY-FOURTH YEAR OF THE COMMONWEALTH.

Judges, WILLIAM FLEMING, Esquire, *President.**
SPENCER ROANE, Esquire.
ST. GEORGE TUCKER, Esquire.

Attorney-General,

PHILIP NORBORNE NICHOLAS, Esquire.

Spotswood *against* Dandridge and others.

Tuesday, October 3d, 1809.

THIS was a suit brought by *Alexander Spotswood*, the appellant, against the appellees, in the late High Court of Chancery. The bill (which was filed in *October*, 1791) charges, that Major General *Alexander Spotswood*, being seised and possessed of a very considerable estate, both

1. To prevent length of time from barring a claim, on the ground that the possession of the defendant was *fiduciary*, such possession must have been *fiduciary as to the plaintiff, or those under whom he claims:* its being fiducia-

* On *Sunday* the 30th day of *July*, 1809, Judge Lyons, late President of the Supreme Court of Appeals, departed this life, in the *seventy-fifth* year of his age. In consequence of his death, that Court now consists of three Judges only; a provision having been made by law, that the vacancy should not be supplied. See vol. I. p. 208, 209.

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ry as to any other person, is not sufficient.

2. An executor having delivered certain slaves to legatees, as their property under the will, a subsequent action of detinue against him, for other slaves which the testator held in the same right, is not sufficient, though prosecuted to a judgment, to prevent the act of limitations from running, both at law and in equity, in favour of the legatees.

real and personal, made and published his testament and last will, whereby, among other things, he devised to his son and heir, *John Spotswood*, all his lands and working slaves *in tail male*, with several remainders over, and also all the tradesmen and servants which should be employed, or, in any way, used in and upon his mine tract of land at the time of his death; and appointed his wife *Butler*, *Elliott Benger* and *Robert Rose*, his executrix and executors; that, after the testator's death, the said *John Spotswood* gave to his sister *Dorothea*, a negro woman called *Molly*, who, proving pregnant some time after, was received by him and replaced by another, called *Mary Ann*, who was one of the entailed slaves; that, after the death of *John Spotswood*, *Nathaniel West Dandridge*, who had intermarried with the said *Dorothea*, demanded of *Mary Campbell*, the widow of the said *John Spotswood*, *Molly*, with her increase, (four in number,) which she declined delivering until she should see *Bernard Moore*, the executor of *John Spotswood*, and guardian of the plaintiff; upon which *N. W. Dandridge* procured from *Bernard Moore* an order for the said slaves, who were accordingly delivered by Mrs. *Campbell;* that *Mary Ann* and her children, at the request of *Dandridge*, were permitted by *Bernard Moore* to remain in his possession, she being the wife of a negro man belonging to him; the said *Dandridge* agreeing to pay hire for her; that she and her children continued in the possession of *Dandridge*, under that agreement, till his death, which happened in the year , during which time she had a number of children; that *N. W. Dandridge* left a will, in which he appointed his son, *William*, and his second wife, *Jane*, executor and executrix, of whom the former only proved the will, and took possession of *Mary Ann* and her children; and, although acquainted with the plaintiff's title, as appears by a letter from him annexed to the bill as part thereof, divided the said *Mary Ann* and her children between the representatives of his father, *N. W. Dandridge*, taking bonds to indemnify him

against the plaintiff's claim; that the plaintiff instituted a suit in the District Court of *Richmond* to recover the said *Mary Ann*, and such of her descendants *as had been retained* by the defendants, executors of *Nathaniel W. Dandridge*, and obtained a judgment for *Mary Ann* and her two daughters, *Betty* and *Hannah*, as also *Jack* and *Polly*, children of *Betty*, and *Polly* and *Johnny*, children of *Hannah*; that, in consequence of that verdict, *Woodson Payne*, who intermarried with *Mary*, one of the daughters of *N. W. Dandridge*, delivered to him *Rachel*, another daughter of *Mary Ann*, and her two children, *Milly* and *Henry*; but he has received no satisfaction for the hires, which he claims from the agreement of *N. W. Dandridge*, who was to pay hire; that several of the descendants of *Mary Ann*, some of whom are named in the bill, others not known, are in the possession of *Patrick Henry*, who intermarried with *Dorothea*, *John Moore*, who intermarried with *Anna*, and *Philip Payne*, who intermarried with *Elizabeth*, daughters of the said *N. W. Dandridge*, and were delivered to them by his executors; that he commenced a suit against *N. W. Dandridge*, in his life-time, for the negroes, which abated by his death; and has since demanded them of the present defendants without success; and concludes with praying a discovery, and decree for the slaves and their profits, and for general relief.

The answer of *Philip Payne* and *Elizabeth*, his wife, admits, that *Mary Ann* is the reputed mother of two slaves, given as a part of the said *Elizabeth's* portion of her father's estate, the names of whom are set forth; that, when they received them, they were unable to labour, so that the trouble of raising them was fully worth their hires; that the respondents heard of the plaintiff's setting up a claim to the slaves, but deny that they gave any bond to the executor to indemnify him against such claim; alleging, that the bond they gave was, in the usual form, for refunding, in case of debts; that, as to *Woodson Payne's* giving up the slaves in his possession, they have often heard

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him say that the plaintiff agreed to return them, in case he should fail in this suit, and have understood he is under a similar engagement with Mrs. *Dandridge;* that they have understood Mrs. *Dorothea Dandridge* was entitled to a proportional part of Major General *Alexander Spotswood's* house servants, under his will; that none were allotted to her except *Molly* and *Mary Ann;* and, from the great length of time which has elapsed since his death, they are now unable to prove any thing respecting it. They refer to his will, and rely upon the act of limitations in the same manner as if formally pleaded, mentioning among other things, that *N. W. Dandridge* died about the year 1785.

The answer of *Patrick Henry* and wife, is nearly the same as that of *Philip Payne* and wife. They have heard *N. W. Dandridge* and his wife say, that the negro *Molly*, in the bill mentioned, was the property of Mrs. *Dandridge*, under the will of her father General *Spotswood*, who gave her a fifth part of his house servants; that on her marriage with Mr. *Dandridge*, Mrs. *Campbell*, then the wife of *John Spotswood*, and mother of the complainant, was unwilling to give up the said *Molly*, and prevailed on them to take the said *Mary Ann* in lieu of her; that, after the division of the house servants, it appeared that several valuable slaves were due to them, and, as they never could get either of them, they (after the death of the said *John Spotswood*) took back the said *Molly*, not in full satisfaction for their share of house servants, there being one or more then due, counting both *Mary Ann* and *Molly*. Mr. *Henry* farther states, that, being applied to as a lawyer for his advice (to the best of his recollection) in or before the year 1773, he advised that *N. W. Dandridge* should claim and hold *Mary Ann* and her children, as his property, until the negroes due to him as his wife's share of the house servants were delivered up, agreeably to the will of General *Spotswood;* that he cannot ascertain the time when the claim set up to *Mary Ann* as his absolute property commenced, but well remembers he had refused

to give her up to the complainant *before* he asked his advice.

The answer of *John Moore* and wife states, that they have heard, and believe it to be true, that *N. W. Dandridge*, deceased, and those who claim under him, have been in quiet possession of the slaves for more than twenty years since the complainant was of full age, and refers to, and relies upon, the answer of *Patrick Henry* and wife, and the act of limitations.

No answer was filed by *William Dandridge*, the executor. The deposition of *Anna Catherine Moore*, one of the daughters of General *Spotswood*, fully established the fact, that only two negro girls (*Molly* and *Lucy*) were allotted to her sister *Dorothea*, as her proportion of his slaves; and she believed that *Lucy* never came into the possession of her said sister. Another witness, *Benjamin Pendleton*, deposed to some circumstances, (rather vague and inconclusive,) tending to shew that, between the years 1764 and 1769, *N. W. Dandridge* held a part, or all, of the negroes in dispute, by a hiring from *Bernard Moore*, the executor of *John Spotswood*, deceased. The letter from *W. Dandridge* (one of the executors of *N. W. Dandridge*) to the plaintiff, mentioned in the bill, was dated *December* 24, 1791, after this suit was brought. In that letter he said that he "always thought the plaintiff's right to *Mary Ann* and her children was undeniable."

The Chancellor dismissed the bill, with costs, whereupon the plaintiff appealed to this Court.

Williams, for the appellant.
Munford and *Warden*, for the appellees.

On the part of the *appellant*, it was contended, that the possession of the slaves in controversy, by *N. W. Dandridge*, had always been *fiduciary*; that the acknowledgment by *William Dandridge*, his executor, of the justice

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of the plaintiff's claim, and the suit and recovery at law, against him, prevented the act of limitations from being a bar.

On behalf of the *appellees*, it was urged, that the testimony to prove that *N. W. Dandridge's* possession ever was fiduciary, was very defective; that, if at any time it was fiduciary as to *John Spotswood* or *Bernard Moore*, his executor, it never was so as to the *plaintiff*, who claimed (as issue *in tail*) under his *grandfather's* will, not under *John Spotswood*, his father; that since it appeared that the negro *Lucy*, who had been allotted to *Dorothea Dandridge*, had never been delivered, but remained with the estate, which was held by *John Spotswood*, and the bulk of which passed from him to the plaintiff, it would now be iniquitous to compel the descendants of *Dorothea Dandridge* to give up *Mary Ann* (whom it was probable she received instead of *Lucy*) and her increase; that, according to the maxim, *that he who seeks equity must do equity*, the plaintiff, if he recovered the children of *Mary Ann*, should give up the children of *Lucy*; that the acknowledgment by *William Dandridge*, the *executor*, could not affect the rights of the present defendants, their claim being under the *testator*, though the property, in coming to them, passed through the hands of the *executor*, neither could the action of detinue and recovery therein, against *him*, be given in evidence against *them*, who were no parties to that suit, and received the slaves from him as their property, by virtue of the will of his testator, especially as the judgment against the executor was for other slaves, held indeed in the same right, but not those now held by the defendants.

In reply, it was said, that the legal representatives of *John Spotswood* (not the plaintiff *only*) were responsible for *Lucy* and her increase, if the defendants had a right to them; that the plaintiff was certainly entitled to *Mary Ann*, as being one of the *entailed* slaves; that the judg-

ment against the *executor* bound the *legatees*, because they necessarily claimed under him, since they could not get their legacies without his assent.

Saturday, October 7. The President, after stating the case nearly as above, pronounced the following opinion of the Court:

"The defendants all rely on the statute for limitation of "actions, to bar the plaintiff's claim, which he would re- "pel, by urging that the possession of the slaves by *N. W.* "*Dandridge*, under whom the defendants claim, was fidu- "ciary; and being in trust for the plaintiff, must be con- "sidered as his possession; therefore, the act of limita- "tions cannot operate against him. Admitting that the "possession of *N. W. Dandridge* was fiduciary, so far as "it respected *John Spotswood*, (father of the plaintiff,) or "*Bernard Moore*, executor of the said *John*, yet, inas- "much as the plaintiff claims, not under his said father, "but as heir in tail under the will of his grandfather, "*Alexander Spotswood*, the possession of *N. W. Dandridge* "ceased in the year 1785, and *this suit* was not instituted "till *October*, 1791, there were more than five years ad- "versary possession in the defendants, which is a com- "plete bar to the plaintiff's title.

"This being the opinion of the Court, and decisive of "the cause, it seems unnecessary to investigate its merits; "in which there appears much equity in favour of the de- "fendants; and I shall only add that the decree is AF- "FIRMED."

Lassly *against* Fontaine.

Monday, October 9, 1809.

A patent for land, granted by a sister state, is one of those *public acts*, to which every other state is bound to give full faith and credit, under the constitution of the *United States*; therefore the *validity* of such patent cannot be collaterally drawn in question, in the Courts of any other State, on a suggestion that the survey on which it was founded was a forgery.

DEBT upon a bond, with condition, that if the obligor, *Fontaine*, do cause a good and lawful right to be made to the obligee, *Lassly*, so that he enjoy peaceable possession on or before *Sept.* 19, 1797, to a tract of land lying in *Davidson* County, State of *Tennessee*, containing 640 acres, granted by the State of *North Carolina*, to *Stockley Donaldson*, by grant dated *July* 20th, 1796, then the obligation to be void; and avers, that the defendant hath not made, &c. *plea*, "conditions performed;" *replication*, and issue thereupon.

On the trial of the cause, the defendant offered in evidence a patent for the lands in the declaration mentioned, under the hand of the Governor of *North Carolina* and seal of the State, which State it was agreed had a right to grant the lands, together with a plat and certificate of survey annexed thereto, to which the name of *A. Foster*, D. S. (deputy-surveyor) was subscribed; as also a deed of bargain and sale, from HIMSELF to the plaintiff, bearing date the same day with the bond, upon which the suit is brought for the lands, as in the bond described, together with the deposition of one *John Smith*, the object of which was to prove, that he, with one *Peyton*, a surveyor, had gone round the boundaries in the deed mentioned, so far as they judged necessary to run the same, in order to ascertain the lands. Whereupon the plaintiff offered to prove, by sundry depositions, that the plat and certificate, annexed to the patent, were not made out and signed by *A. Foster*, or by his authority; *alleging*, *that if he could prove this*, that the said patent was a fraud upon the State of *North Carolina*, and void. To the introduction of which testimony, the defendant, by his counsel, objected; the District Court sustained the objection, and refused to admit the evidence; and the plaintiff appealed to this Court.

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Wickham, for the appellant, contended that, under such a covenant as that contained in the condition of this bond, the plaintiff was entitled to sue, on shewing a defective title; it was not necessary to prove an actual eviction, as where the covenant is for quiet enjoyment.

This was not merely a covenant for quiet enjoyment, but *to make a good and lawful right.* The words "so that "he shall enjoy," &c. cannot be considered as qualifying the preceding part of the sentence; because the enjoyment of peaceable possession, was only the *consequence* of having a good and lawful right.(*a*)

The State of *North Carolina* might set aside the patent, for fraud in obtaining it, either by *scire facias* or some other judicial proceeding. The laws of every country must be presumed to be conformable to general principles of equity. It is a matter of history, that *Stokely Donaldson* forged surveys to an immense amount. If the survey be a forgery, the patent founded on it is a mere nonentity, an ideal thing; nothing passes by it, and we might clearly give evidence that there was no such land. It is true, that this Court cannot, by *its* act, vacate a patent emanating from the State of *North Carolina*; but, as between *third* parties, (not trenching upon the sovereignty of the State,) the Court *may* and *must* decide collaterally on the effect of the patent.

(*a*) 1 *Bulstr.* 2. *Procter* v. *Johnson. Cro. Jac.* 233. *Yelv.* 175. S. C. 3 *Lev.* 46 *Nervin* v. *Munns, &c.* 1 *Saund.* 60. *Gainsford* v. *Griffith.*

Call, for the appellee, contended, that the point, whether there was any land or not, was not raised by the bill of exceptions. *That* admits that there was land; but states, that the plaintiff insisted on introducing evidence to prove that the title was defective, in consequence of a fraud in obtaining the patent.

The plaintiff is estopped by the instrument on which he sues, from urging the point for which he now contends. The conditions of the bond not only states expressly, that the State of *North Carolina* had granted such land, but describes it particularly. Instead of shewing that the de-

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fendant had no title to this land, the plaintiff undertakes to prove, that the State of *North Carolina* never granted such. If this paper be made the foundation of the action, it must fail; because the plaintiff claims under a grant from *N. Carolina*, and then says that *N. Carolina* had no land. *Perhaps* an action of *deceit* might lie.

As to the objection, that if the surveys were forged, the grant founded on it was void, it cannot appear to this Court, that surveys were necessary. But if they were, the proper authorities in *N. Carolina* were satisfied. If the State of *N. Carolina* did not think proper to bring a *scire facias* to vacate the patent, shall the State of *Virginia* undertake to vindicate its rights? *This Court*, in the case of *Witherinton* v. *M'Donald*,(*a*) have lately said, that they would not suffer the validity of a patent to be impeached in this collateral way.

(*a*) 1 *Hen. & Munf.* p. 306.

It is sufficient if the inferior Court gave a right judgment; it is unimportant whether their *reasons* for it were right or wrong.(*b*)

(*b*) 1 *Call*, 127. *Davis* v. *Miller.*

Wickham, in reply. According to the arguments of Mr. *Call*, the obligee could not sue at all. He could not bring an action of deceit, because, as between him and the obligor, there was no fraud. But it is said he is estopped by the words of the condition of the bond; which admits that there was such land. It should be recollected that these are the words of the *obligor*. *He* states, that the land was granted by the State of *N. Carolina*; and if it cannot be found, he has not complied with the condition of his bond. But the action was properly brought on the warranty.

The opinion of the Court was manifestly wrong. We were not permitted to meet the testimony of the defendant. We were not permitted to shew an adverse possession in the State of *N. Carolina*, or in any person whatever. The Court determined, that it was sufficient for him to have exhibited a deed purporting to be a conveyance of the

land from him. This prevented us from going further, and objecting that there was no conveyance from *Donaldson*. The *onus probandi* lay on the defendant by the plea of covenants performed. He introduced evidence to prove it, by shewing a survey of the land, but we were prevented from meeting it, by shewing that it was a forgery.

Judge TUCKER, (after stating the case.) By the 4th article of the constitution of the *United States*, "full faith "and credit shall be given, in each State, to the *public acts*, "records and judicial proceedings of every other State." A patent, under the hand of the governor and seal of the State, is one of those public acts to which full faith and credit must be given in every Court in the union, being a record of the highest nature. If the Courts of this State were to undertake to pronounce the public act of a sister State, thus solemnly authenticated, VOID, in consequence of any misfeasance or omission of duty in the inferior ministerial officers of that State, whose faithful discharge of their duty the patent supposes, it might lead to consequences far beyond the reach of my foresight. If the patent be void, or voidable, for the reasons suggested in the bill of exceptions, I conceive it to be competent only to the State of *North Carolina*, and its Courts, to pronounce it void. In what manner a patent may be avoided in that State, whether by a *scire facias* issuing out of the Court of Chancery, or otherwise, we are not informed. But no evidence, not of equal dignity with the patent itself,(*a*) can, I presume, be admitted in this State, to annul the operation of a grant made in due form by the proper authorities of any other State. I therefore think the evidence was rightly rejected by the Court.

(*a*) *See* 1 *Hen. & Munf.* 308. *Witherinton v. M'Donald.*

A second exception was taken to the Court's opinion. The plaintiff offered sundry depositions to prove that the defendant had not, when requested, gone himself to *Tennessee*, and shewn, or procured any other person, to shew

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the land to the plaintiff; to the admission of which testimony the defendant, by his counsel, objected. And the Court being of opinion that the defendant was, by the condition of his bond, in substance bound to make the plaintiff a lawful right, under which he might enjoy peaceably the said land, but that he had not bound himself by the said condition, to shew the land to the plaintiff, the last-mentioned testimony was likewise rejected; and I am of opinion properly. If indeed the condition of the bond had been, that the defendant should make to the plaintiff a feoffment in fee-simple, with livery of seisin, he might then have alleged the refusal to go upon the land to give actual seisin thereof, or appointing an attorney so to do in his behalf as a breach of the condition.

But having accepted a deed of bargain and sale for the lands from the defendant, there was no obligation on the defendant afterwards to go and shew the lands, unless he had specially undertaken to do so, which, for any thing that appears from the condition of this bond, he did not. I therefore think the judgment must be affirmed, there being no other point submitted to the Court but the admission or rejection of the above-mentioned evidence.

Judge Fleming. It seems strange that no notice is taken in the bill of exceptions, of the want of a conveyance from *Donaldson*, the patentee, to *Fontaine*; and as no such conveyance appears on the record, it may be presumed that none was exhibited at the trial. But as the circumstance was omitted to be stated in the bill of exceptions, this Court will take no further notice of it. I am of opinion that the decree be affirmed.

Absent, Judge Roane.

Braxton *against* Gaines and others.

Thursday, October 6, 1809.

GAINES, executor of *Robert Page* and *Pollard*, administrator of *John White*, brought a bill in Chancery against the widow and children of *Carter Braxton*, deceased, who left no executor, and on whose estate no person had administered for the discovery of certain slaves and other property mortgaged to *Page* and *White* by *Braxton*, *June* 10, 1792, by deed acknowledged and recorded in the General Court, for the purpose of indemnifying them against certain securityships for him; but which were to remain in his possession, until default made by him, to which was added a covenant in behalf of *Braxton*, his heirs, &c. to save them harmless from all actions, &c. on account of the said securityships, and that he and his heirs, &c. should and would pay off and discharge, *out of the above conveyed or meant to be conveyed premises*, out of his proper estate, all such sums of money as should thereafter be due for principal, interest, costs, &c. And that it should be lawful for the mortgagees, and each of them, &c. who should be brought in jeopardy by breach of the proviso in the mortgage, or of that covenant, in any respect, by action or otherwise, instantly to take possession of the premises, and sell and dispose thereof at public auction, for the purpose of indemnifying themselves, &c.

Where a *child*, who is an infant, is deemed a *purchaser* for valuable consideration, of a slave, the circumstance that such child resides in the family of its father, and there keeps the slave, over whom it exercises every act of ownership, will not entitle the creditors of the *father* to disturb the possession of the child, although the father had included the slave in a mortgage, to indemnify the mortgagees against certain securityships.

The bill suggests, that after *Braxton's* death all the mortgaged property which *remained* alive and *unsold*, came to the hands of his widow and children, of whom the appellant was one, and at that time of full age, or to some or more of them, but to the hands of which, and in what proportion, the plaintiffs cannot say; but call upon the defendants to discover what has come to their, or either of their knowledge, concerning deaths, births, and sales out of the said property, as well before *Braxton's* death as

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after, *and by what right or title they, or either of them, hold the same or any part thereof.* And that they may be severally foreclosed, unless they indemnify the plaintiffs by a certain day; and for general relief.

Elizabeth Corbin Braxton, the only appellant from the Chancellor's decree, according to the prayer of the bill, by her answer states, that she is possessed of *Thamar* and four others descended from her, and that, since the date of the mortgage referred to, *Thamar* has had two children; but contends, that those slaves could not be considered as the property of her deceased father, at the date of the mortgage, (*June* 10, 1792,) for that twenty years ago, (that is, in *March*, 1780, the answer being sworn to, *March* 15, 1800,) before the said *Thamar* had any increase, she was declared by her father to be her own and peculiar property; was considered generally as belonging to her, and particularly by the mortgagees, *Robert Page* and *John White*, intimate in her father's family by their intermarriage. That the defendant, when of very tender years, received a present from her grandfather, *Richard Corbin*, which was deposited in the hands of her father, who having failed to invest her with it, it being in money, declared to her that the said slave, *Thamar* and her children, were her property, and that as she had so long had possession of her, and it was so notorious that the property was hers, she considered it entirely unnecessary to require a bill of sale, or any other instrument of writing, to insure to her property which she had for such a series of years held and enjoyed as absolutely and indisputably hers. That not only the *right* of the slave was *not* in her father at the date of the mortgage, but he was not invested with the possession of them, she having lent the slave *Thamar* to her brother, with whom she then lived as a cook, and her children with her, by the defendant's permission.

The affidavit of *Francis Corbin* states, that he well remembers that when this defendant was a little girl, the

partiality of her grandfather, *Richard Corbin*, brought her to *Laneville*, where she lived for several years. That a negro woman then attended her as a nurse, by the name of *Thamar*, and that it was always understood in the family that his father, *R. C.* had given the said negro woman to the defendant, *Ann C. Braxton*. That since his return from *England*, where Mr. *Braxton's* affairs had been the subject of his father's unceasing reflections, he has been frequently advised by him to take care that his niece, the defendant, did not lose her maid *Thamar* and her children in the scuffle, for that HE had paid Mr. *Braxton* 100*l.* sterling for her, and *given her* to the defendant. He adds, the particulars, as collected from him, are these: Mr. *Braxton*, being pressed in *Williamsburg* for that sum, applied to his father for it. He advanced it for him by a bill of exchange, and *gave it to the defendant*. It was to lie in her father's hands, and interest to accumulate on it till she should marry or come of age. But by agreement a short time afterwards, and *long before* Mr. *Braxton* became embarrassed in his affairs, the said negro woman and her increase were given to the defendant *in lieu of the said* 100*l. sterling and interest*. She has remained the property of the defendant ever since; and until called on to state what he knew of the matter, he did not imagine her right had ever been contested.

This affidavit was admitted to be read as evidence in like manner as if the examination of the witness had been taken by a commissioner. There is no other evidence in the cause as between these parties upon this particular point.

The Chancellor (the late Mr. *Wythe*) decided, that the defendant had no title to the slaves, and that they be delivered up to commissioners to be sold, &c. The defendant, *A. C. Braxton*, alone, appealed to this Court.

Call, for the appellant, (Miss *Braxton*,) contended, that the decree of the Chancellor could not be supported on

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any ground whatever. An attempt had been made to charge her as a mere *volunteer*, when she was a *purchaser* for valuable consideration. The property was *paid* to her by her father, long before the date of the mortgage, in lieu of a sum of money given her by her grandfather; she had been upwards of twenty years in peaceable possession, and had exercised every act of ownership over it. Though she lived in her father's family, yet no possession adverse to hers was attempted to be proved.

But even if her title could be disturbed, the plaintiffs must shew that her father was the proprietor of the property at the time of the transfer to his daughter, and indebted in a sum vastly beyond his ability to pay. It is not enough to shew that a DONOR *is indebted*, but it must be further shewn that he was *so much indebted at the time of the gift*, as not to be able to make it, without injury to his creditors.(*a*)

(*a*) *Cowp.* 432. *Cadogan et al.* v. *Kennet et al.* 1 *Fonb.* b. 1. c. 4. s. 12. note (*a*), cites *Townsend* v. *Windham*, 2 *Ves.* 11. *Stileman* v. *Ashdown*, 2 *Atk.* 481. *Doe* v. *Routledge*, *Cowp.* 711. *Russel* v. *Hammond*, 1 *Atk.* 13.

Warden, for the appellees, observed, that it was stated in the bill, and not denied in the answer, that the persons whom the complainants represented had paid upwards of 2,000*l.* as sureties of *Carter Braxton*. It was also a matter of record, as well as of public notoriety.

With respect to the slaves in question, the possession was always in *Carter Braxton*. His daughter, Miss *Braxton*, was an inmate in her father's house at the time of the mortgage, and so continued ever since. There being no public conveyance of the property to Miss *Braxton*, the possession of her father was sufficient to induce a purchaser to take a conveyance. Miss *Braxton* does not pretend to claim the slaves by any deed or record. She only says, that her father gave her the negro *Thamar*, in consequence of a sum of money appropriated by him, which had been given to her by her grandfather. The testimony of *Francis Corbin*, as to this fact, is mere *hearsay*, and differs, in some respects, from the account given by Miss *Braxton* in her answer. He states that his father,

who was the grandfather of Miss *Braxton*, lent 100*l.* sterling to *Carter Braxton*, which was to lie in his hands, and the interest to accumulate, till his daughter, the appellant, came of age. There is no evidence that this sum of money was paid for the negro, but hearsay. It is, in fact, only a *gift* from *Carter Braxton* to his daughter, and subject to all the legal consequences of such. She cannot, therefore, be considered as a *purchaser*, nor can the decree of the Chancellor, on any principle, be reversed.

[*Wirt* and *Randolph* also argued the cause at large; but the Court being clearly of opinion that Miss *Braxton* was to be regarded as a fair *purchaser*, for a valuable consideration paid by her grandfather, the only point of any importance left to be considered was, whether she had held an *exclusive* possession of the slaves, and exercised acts of ownership over them. This being a matter of *evidence*, more than of *legal inference*, it is deemed unnecessary to insert the arguments at the bar, further than has already been done.]

Saturday, October 7th, 1809.

Fox, Administrator, with the will annexed, of Ragsdale, *against* Govan.

Although a *palpable frivolous* bill of exceptions to the opinion of the Court below, is not sufficient to prevent this Court from taking up a cause out of its turn on the docket, as a delay case; yet, if the point be in any degree doubtful, it will not be so taken up.

WARDEN, for the appellee, moved to take up this cause out of its turn, as a delay case, notwithstanding there was a bill of exceptions in the record. But he contended, that the exceptions were merely frivolous, being to the opinion of the Court, refusing a motion for a continuance.

Wickham, for the appellant, had no objection to bringing on the cause at any time; but, as counsel for the appellant, he wished to be heard. He would never contend, that the rule of the Court for taking up such appeals as were merely for delay, out of their turn on the docket, should be evaded, by introducing into the record a frivolous bill of exceptions; but this, he observed, was not such a case. The principle involved in it had been recognised in the case of *Chisholm* v. *Anthony*,(*a*) in this Court.

(*a*) 1 *Hen. & Munf.* 27.

The case was this. *James Govan* brought an action of debt against *John Fox*, administrator, with the will annexed, of *Drury Ragsdale*, in the County Court of *King William*, on a bond of his testator. At the *March* term, 1807, the defendant pleaded "*payment;*" upon which issue was joined: at the *August* term following, he moved the Court for a continuance of the cause till the next term, on affidavit (made a part of the record) that "he had been "prevented, since the last Court, by indisposition, from "obtaining a settlement of his administration account, &c. "that commissioners were appointed for that purpose; and "that he was desirous to obtain a settlement with all speed." The bill of exceptions further states, that, by the next term, the defendant expected to have the settlement of his account aforesaid recorded in Court; "so as that by ascer-

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"taining the state of the assets in his hands, he might know "whether it would be necessary for him to amend his "plea." But the Court upon seeing, among the papers in the cause, a memorandum filed containing a statement of the bond on which suit was brought, with a calculation of interest up to the time of several payments which had been made; and also a mortgage from the testator for the same debt, (which statement and mortgage are set out at large,) refused to continue the cause. A verdict was obtained against the defendant, and judgment thereupon, which, on appeal to the District Court of *King* and *Queen* was affirmed. From that judgment the defendant again appealed to this Court.

Judge ROANE was opposed to taking up the case. There might be sufficient grounds for continuance. Where a bill of exceptions is palpably frivolous, and the Court can have no doubt of it, the cause will be taken up as a delay case. But, without giving any opinion on the merits, he did not think this such a case.

Judge TUCKER thought there were *prima facie* good grounds for the indulgence asked for by the appellant; especially as the creditor had thought proper to commence an action on the bond, by which the executor might eventually be charged personally, instead of pursuing his remedy on the mortgage. He mentioned the case of *Hook v. Nanny and others*,(1) in which this Court had reversed

(1) Hook *against* Nanny and others.

November 9, 1805.

Order Book, No. 5. p. 239. MS.

THIS was an action of trespass, assault and battery, and false imprisonment, brought by the appellee, *Nanny*, and five others, her children, in the County Court of *Montgomery*, for the recovery of their

A Court, granting or refusing a continuance of a cause, ought to exercise a sound discretion. If, therefore, a party be ruled into a trial, when it appears from the facts *stated in a bill of exceptions*, that he was entitled to a continuance, the judgment obtained against him will, for that cause, be reversed by a Superior Court.

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a judgment, because the Court below had refused a continuance when it ought to have been granted. The case of *Chisholm* v. *Anthony*,(a) turned upon the equity of allowing freedom. *Plea*, that the plaintiffs are slaves, and the property of the defendants. *Replication*, that they are free persons, and not slaves.

(a) 1 *Hen. & Munf.* 27.

At the trial, the defendant (*Hook*) filed three several bills of exception to the opinion of the Court, one of which was in the following words: "On this cause being called, the defendant, *Hook*, moved the "Court for a continuance, stating, on oath, that one of his counsel, in "whose assistance he materially relied, was absent. He further sta-"ted, that *Biram Ballard* was a material witness, and, without whose "testimony, he could not safely go to trial; that he had enclosed a "subpœna in a letter directed to *Alexander Smyth*, one of his counsel, "to be by him conveyed to the sheriff of *Grayson*, in which County the "witness resided; that the letter was neglected to be delivered by the "person to whom it was confided; that t h person to whom it was con-"fided was the Deputy Clerk, who did not know the letter contained a "subpœna. He further stated, that he had recently discovered testi-"mony, which he conceived very material, in the State of *North Caro-"lina*, which he had not been able to procure. On these facts, the "counsel for the defendant founded the motion for a continuance, as it "was the first time the cause was called. But the Court overruled "the motion; the counsel for the plaintiffs agreeing to admit a cer-"tain affidavit taken by the defendant, which was said to contain some "of the information thus lately discovered; and determined that the "cause should come to trial: the defendant's counsel objected, and, "to save the benefit thereof, prayed that this his bill might be sealed, "which was done."

Verdict, that the plaintiffs were entitled to their freedom, and judgment thereon, in the County Court, from which an appeal was taken to the District Court, holden at the *Sweet Springs*, where the judgment was affirmed, and *Hook* again appealed to this Court.

Saturday, November 9, 1805. The opinion of the Court was, that the judgments were erroneous in this: "that the cause ought to have "been continued for one term, on the motion, and at the costs of the "said *John Hook*, for the reasons assigned by him in his first bill of "exceptions." Judgments of the District and County Courts reversed, verdict set aside, and a new trial directed.

[☞ In the case of *Woods* and *Bemis* v. *Young*, 4 *Cranch*, 237. the Supreme Court of the *United States* decided differently; being of opinion that, after a cause is at issue, the granting or refusing a continuance is "merely a matter of favour and discretion;" and that the Court

ing an executor or administrator to amend his plea, as further information of the state of the assets might render it necessary.

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Judge FLEMING said, it was the unanimous opinion of the Court, that the cause should not be taken up as a delay-case.

Blow, Administrator of Kello, *against* Taylor and another, Executors of Williams.

Saturday, October 7, 1809.

On the dissolution of an injunction, the complainant has a *right* to continue his cause as an original suit; therefore, if the Chancellor, without his consent, dismiss the bill at the same time that he dissolves the injunction, it is error.

THE appellant obtained an injunction in the Superior Court of Chancery, for the *Williamsburg* District, to stay proceedings on a judgment at law rendered by the District Court of *Suffolk*. On the coming in of the answer, the Chancellor "being of opinion that the question was "purely of a legal nature; that (contrary to the allega-"tions of the plaintiff) a fair and full trial thereof had been "had before a Court of Law; that the plaintiff made no ef-"fort before that Court to obtain a new trial of the issue; "and, therefore, that to interfere further in the case would "be an assumption of power on the part of this Court, "which would go to confound all distinction between "Courts of Law and Courts of Equity, or rather to destroy

above "cannot look into the merits of the question, whether the "Court below ought to have granted a continuance of the cause."—*Quere*, as to the propriety of the decision in that case, which was submitted without argument, and seems not to have been fully considered. Courts may and *must* often exercise a discretion; but it has always been held, that it must be a *sound* and *legal* discretion. Were it otherwise, a party might be as much aggrieved by an *arbitrary* or *erroneous* exercise of discretion during the progress of a cause, as by the most erroneous opinion on the final judgment; and yet in one case he could obtain redress before a higher tribunal, but not in the other.]

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"altogether the utility of Courts of Law, by abolishing "their decisions and taking up a fresh, without any new "circumstance or colour of equity, cases peculiarly within "the province of those Courts, and which they had pre- "viously, fairly, and solemnly decided," (on the 6th of *October*, 180-,) *dissolved the injunction*, and, *at the same time*, before any replication was filed by the complainant, *dismissed the bill;* declaring, that "the principle on which "the dissolution took place, went to the entire extermina- "tion of the cause from that Court." From which decree an appeal was taken to this Court.

After an argument on the *merits*, by *George K. Taylor*, for the appellant, he contended that, if all the other points should be against him, the decree must be reversed, because the Chancellor had dismissed the bill at the same time that he dissolved the injunction. A party may go into a Court of Chancery as a matter of *right*, and may ask an injunction, as a *favour*, from the Court. But after the injunction is dissolved, he has still a right to reply to the answer of the defendant, and continue his cause as an original suit, for a hearing in chief.

The whole Court (consisting of Judges FLEMING, ROANE and TUCKER) were clearly of opinion, that the complainant had a right to continue his cause, as an original suit, after the dissolution of the injunction; and directed a decree to the following effect to be entered: "That there "was no error in so much of the decree as dissolved the "injunction; but that the Court erred in dismissing the "bill, which should have been retained for further pro- "ceedings, with leave to the parties to take depositions," &c.

Eppes's Executors *against* Cole and Wife.

Argued at the April Term, 1809.

ASSUMPSIT brought by *John Cole* and *Rebecca* his wife (late widow of *Hamlin Eppes*, deceased) against *Peter Eppes*, in the District Court of *Petersburgh*.

1. *Assumpsit for use and occupation of land*, by permission and assent of the plaintiff, on an *express* promise to pay the plaintiff a certain sum, or, in general terms, to pay him to his satisfaction for such use and occupation, lies at common law, independently of the stat. 11 *Geo.* II. c. 19.

2. *It seems*, that such action is also maintainable *without proof of an express promise.* But the point was left open in this case. *Ideo quære?*

The declaration contained three counts; 1st. For use and occupation, for 19 years, of 252 acres of land, which were, at the time of such occupation, the property of the plaintiff's wife, who was then a *feme sole*, laying the *promise* to the *plaintiffs*; 2d. *Quantum valebat*, for use and occupation, for 19 years, of another plantation, containing the same number of acres, (being the dower land of the said *Rebecca*,) by permission of plaintiff *Rebecca before* the marriage, and of plaintiff *John* since; 3d. That, in consideration that defendant had the use and occupation of 252 acres of land (being the dower land, as aforesaid) for 19 years, by the permission and assent of plaintiff *Rebecca*, *before* the marriage, and of plaintiff *John since*, defendant assumed to pay them *to their satisfaction.* Plea, *non assumpsit*; and issue.

At the trial, the defendant demurred to the evidence, which proved, that, in *June*, 1787, a conversation passed between *John Cole*, the plaintiff, and *Peter Eppes*, the defendant, wherein the plaintiff told the defendant, "Col. *Eppes*, you have *greatly deceived me*, as "to the thirds of that land;" the defendant replied, "that *he had*; but that he had written to his brother "concerning the business, and had got his answer, and "that it should be settled directly; and you (meaning "the plaintiff) *shall be paid therefor to your satisfac-* "*tion.*" It was further proved, "that *Hamlin Eppes*, "the former husband of the plaintiff *Rebecca*, and un- "der whom the plaintiffs claim, died in the month of "*June*, 1774; that the defendant was then in posses-

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"sion, to wit, in 1787, and had been ever since the "year 1774, *before the death of Hamlin Eppes*, of the "land, to one-third of which, as dower, to wit, 252 "acres, *the plaintiffs were entitled in right of the plain-*"*tiff Rebecca*, until the year 1794, when dower was as-"signed the plaintiffs, by a decree of *Dinwiddie* County "Court in Chancery." It was further proved, "that "the said land was worth at least fifteen pounds *per an-*"*num*; and this being all the evidence introduced by "the plaintiffs," the defendant demurred. A conditional verdict was found for 285*l.* damages.

The demurrer being argued, the District Court gave judgment for the plaintiffs; from which the defendant appealed; *and* having afterwards *died*, the appeal was revived by his executors.

George K. Taylor and *Robertson*, for the appellants, contended, 1st. That, upon the facts disclosed in the demurrer, the action of *assumpsit*, for use and occupation, was not maintainable; 2d. That the promise (whatever it intended) having been made in 1787, and the plaintiff having, seven years after, to wit, in 1794, claimed and obtained an assignment of dower against the said defendant by a decree of *Dinwiddie* Court, by such subsequent proceedings relinquished the benefit they might have claimed from such *assumpsit*, and either obtained, or might have obtained, by that decree, full satisfaction for the time that the dower was withheld.

1st. In support of the first point, they argued, that *assumpsit* would not lie for rent, before the stat. 11 *Geo.* II. c. 19. which never was in force in this country; and that *assumpsit* for use and occupation even under that statute, can only be maintained where the defendant holds by permission of, or by demise from, the plaintiff:(*a*) therefore such action will not lie, where the possession has been *adverse* or *tortious*.(*b*) Here there is no

(*a*) 1 *Esp. N. P.* 20.
(*b*) *Ibid.*

proof of possession by permission of, or contract with the plaintiffs; but, on the contrary, the possession appears to have been *adverse;* for the defendant is in possession before *Hamlin Eppes's* death, and remains so until 1794. Until 1794 the plaintiffs never are in possession. They then obtain it in consequence of a suit in chancery, laying claim to dower. This long continued possession of the defendant, (against those who never were in possession until the decree of a Court bestowed it upon them,) without paying any rent in the mean time, is utterly irreconcilable with a possession by permission, or under contract. The presumption is, that he held as fee-simple proprietor by a purchase from *Hamlin Eppes.* If he did not, but was his *tenant* merely, he, after his death, either paid or was liable to pay rent to his heir at law, in whom was the reversion, and not to his widow, who had claim to no part of that rent till her dower was assigned. And, again, the widow (if he had held under a contract with *her*) would not have sued *her own tenant* for an *assignment of dower* but would have turned him out of possession by ejectment. These circumstances, therefore, shew an adverse possession, and not one by contract or permission.

Nor does the conversation in 1787 make any difference. For *Cole* reproaches *Eppes* for deceiving him respecting *those thirds*, not then laid off. *Eppes* admits it, and says he has written to his brother *respecting the business.* What business? The same thirds, not yet laid off, but claimed. The conversation evidently related altogether to compensation for the *value of the thirds*, not for the *use and occupation.*

But, even if this could be interpreted a promise (in consideration of her loss) for the *rent*, instead of the thirds of the land itself, it would not be obligatory; because the previous use and occupation having not been by her consent or permission, such promise was on a groundless or frivolous consideration.(*a*) A previous moral obligation to pay would have made it binding :(*b*)

(*a*) 1 *Esp. N. P.* 94.
(*b*) *Ibid.* 95.

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but, if the defendant were *Hamlin Eppes's tenant*, he was under no moral obligation to pay rent to the *widow*, when the law makes him liable to pay it to the *heir*. If he had bought the land of *Hamlin Eppes*, he paid a valuable consideration for it, under the idea of obtaining a complete title; and, having paid that consideration, under what moral obligation is he to pay 19 years' rent for finding himself deceived in the bargain? But, independent of these objections, the promise was without consideration, because the demandant in a writ of dower can in no case recover damages where she has delayed herself; and, where her husband did not die seised, can never recover them at all.(*a*) And, therefore, in sundry suits for dower, brought by Mrs. *Elizabeth Braxton*, the Chancellor gave her no rents but from the date of his interlocutory decree.

(*a*) *Co. Lit.* 32. b.

And such a promise, under such circumstances, even if it were not for dower, would be void for its insufficiency and uncertainty; for, suppose that *A.* breaks *B.'s* nose, or kicks his breech, and afterwards promises to pay him for the outrage to his satisfaction, could *assumpsit* be maintained on such a promise? No: the party must still resort to his action of assault and battery. So here the remedy is not by *assumpsit*, for the deforcement of dower is as much a *tort* as an assault; and in 4 *Bac. Abr.* (*Gwill.* ed.) p. 44. *ad finem*, tit. *Rent*, letter K. the doctrine is laid down, that *assumpsit* for use and occupation lies only *for a sum in gross*.

2d. In support of the second point, they observed, that even *without* such promise, the damages were recoverable in the suit in Chancery, if the plaintiffs were *legally* entitled to them;(*b*) of course, *with* such promise. Will the Court, then, permit the same plaintiff to vex the same defendant by two actions for the same cause, when one action would have settled the whole? It is laid down, that no action shall be maintained which it is contrary to the policy of the law to support.(*c*)

(*b*) *Curtis* v. *Curtis*, 2 *Bro. Ch.* 620.

(*c*) 1 *Esp.* 92.

Now, however it may be consonant with the policy of *lawyers* to support such an action, it cannot be the policy of the law, if, indeed, its purpose be justice. Therefore, if a man were to bring *detinue* for a slave, and ask no damages for his hire, he would not be permitted to claim such damages in a subsequent action.

Hay, contra. The declaration charges, that the defendant held by the permission of the plaintiff *Rebecca*, and the circumstances disclosed by the testimony are sufficient to authorize a conclusion, that such was the fact. But, suppose he was guilty of a trespass, and illegally entered on the land, his subsequent promise was sufficient to bind him: the *tort*, if any, was thereby waived, and he held by the permission of the plaintiff. It does not appear under what right *Peter Eppes* was in possession: it may be *inferred*, from his length of possession, that he was a purchaser of the land. But, although he may be regarded as a purchaser from *Hamlin Eppes*, the moment of his death his widow had a complete right to dower. Since, then, she did not bring suit, for so many years, the inference is inevitable, that *Peter Eppes* held in virtue of a contract with her.

It is objected that the promise related to *the thirds of the soil itself*, and not to *rent*. But the words were, "I will *pay* you to your satisfaction." If what he said had related to the soil, would he not have said, "I will "have your wife's third of the land laid off?" The plain import of the words was a promise to pay money; and this, of itself amounted to a contract, if one had not existed before. The Jury might have inferred a contract, and, on demurrer to evidence, the Court has a right to infer whatever the Jury might.

It is said, too, that *assumpsit* for use and occupation lies only where the contract is for a *specific sum*. The authorities cited do not support the position; and 1 *Supp.* to *Viner*, 124, 4 *Esp. Rep.* 59. and 1 *Bac. Abr.* (*Gwill.* ed.) 257. are authorities to the contrary. In the

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passage last cited from *Bacon*, it is said, that before the statute 11 *Geo.* II. c. 19. it was holden, that this action was maintainable "where there was no stipulation *for any express rent*;" citing *Mason* v. *Welland*, *Skinner*, 238. 242. S. C. in 3 *Mod.* 73. by the name of *Mason* v. *Beldham*.

But, if there was no *legal* obligation, the defendant was under a *moral* obligation to pay; and this was sufficient to support an *assumpsit*; as in the case of a promise to pay a debt barred by the act of limitations, or of a bankrupt promising payment, after having obtained his certificate. The delay of the widow to bring suit was occasioned by the promises of the defendants, and the confidence reposed in them.

I admit, that in a writ of dower damages are not recoverable, except when the husband died seised. But that makes no difference in this case. The parties surely could settle their own rights as they pleased. The widow could have recovered the *land* sooner, and, after recovering it, might, it is agreed, have rented it to *Eppes*. If so, were not the parties at liberty to make a contract without the expense and trouble of a previous recovery?

As to the second point, that the rent might have been recovered in the suit in chancery; the rule of law, that two actions shall not be brought where one would do, is *general*, but *not universal*. A person may bring ejectment and trespass, for the mesne profits. So, in *detinue* for slaves, the great object is the *title* of the slaves, and not *hire*. If slaves be recovered, and no hire given, a Court of Chancery will entertain jurisdiction for an account of the profits. In like manner, if a Court of Chancery, in a case before it, does not all that it might, this is no reason why a Court of Law should turn the plaintiff out of doors. But could it have been done in this case? Where the husband does not die seised, the widow cannot recover damages at law; and equity follows the law.

Suppose, then, the bill had demanded damages, the Court would not have given them. If this particular contract had been stated, the Court of Chancery would have said, "We have nothing to do with this: institute your action at law upon the special agreement, and you will recover damages there."

Wednesday, November 8. The Judges pronounced their opinions.

Judge TUCKER. In considering this case, it will first be necessary to examine whether the evidence stated in the defendant's demurrer be sufficient for a Jury to have found a verdict for the plaintiffs, upon either of the counts in the declaration.

The demurrer to evidence states, that in *June*, 1787, a conversation passed between the plaintiff and the defendant, wherein the former told the latter, "that he "*had greatly deceived* the plaintiff, as to the thirds of the "land." The defendant replied, "*that he had*, but "that he had written to his brother concerning the busi- "ness, and got his answer, and that it should be *settled* "*directly;* and you," meaning the plaintiff, "shall be "paid therefor to *your satisfaction.*" It is impossible not to understand this conversation, as relating to some prior agreement between the parties, respecting the land which is alleged to have been in the occupation of the defendant. It is impossible not to understand it as recognising the plaintiff's right thereto, and the defendant's obligation to make him satisfaction for the enjoyment he had had of it, which he had failed to do, according to some *previous promise;* the acknowledgment of the defendant, *that he deceived* the plaintiff, will admit of no other construction; for unless he had *promised*, he could not have *deceived* him. The subsequent promise, that the plaintiff should be *paid therefor to his satisfaction*, is amply sufficient to support the second

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count, which is a *quantum valebat*, for the use and occupation of a plantation for a certain number of years. And I think a Jury might well have inferred, from this evidence, that the defendant had agreed to pay the plaintiff for the same, so long as he should occupy and enjoy it, which would also support the first count. The nature of the right of the plaintiffs, thus *acknowledged* by the defendant, cannot, after the *enjoyment* of the land, under them, be necessary to be inquired into. If there had been no demurrer to the evidence, I think the Jury ought to have found a verdict for the plaintiff, and therefore think the District Court gave a correct judgment upon the demurrer.

The next question is in the nature of a motion in arrest of judgment; namely, whether this action of *assumpsit*, for the use and occupation of a plantation, lies in this country.

We are told by Mr. *Espinasse*, (1 *Nisi Prius*, 20.) that the action of *assumpsit* for use and occupation was given by stat. 11 *Geo.* II. c. 19. which was never in force in this country. Judge *Buller*, in his treatise on the same subject, p. 138. says, at common law it was holden, that *assumpsit* would lie for rent on an *express* promise; but not upon an *implied* promise; and such express promise must have been made, *at the same time with the lease;* and for this he cites 3 *Lev.* 150.

Mr. *Espinasse* does not appear to be altogether correct in this passage. The action for use and occupation was not given by the statute of *George:* it had been used at least from the time of *James* the first, as the case of *Dartual* v. *Morgan*(*a*) clearly proves; and the case of *How* v. *Norton*(*b*) shews it was in use in the time of his son *Charles* II. and a variety of other cases might be shewn to prove the same thing. We are told by Judge *Bathurst*, that the statute was made for the benefit of landlords, and to prevent tenants from putting them to *difficulties* (after enjoyment of the lands)

(*a*) *Cro. Jac.* 598.

(*b*) 1 *Lev.* 179.

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in recovering their rents under *parol* demises or agreements; for, before the statute, in actions for the use and occupation, the landlords were continually *nonsuited*, by the tenants' proving, at the trial, some *parol demise*, or *memorandum* in writing, *amounting to a demise;* for, in THAT *case*, the landlord ought to have brought an action of *debt*, and not case, on *assumpsit;* which was remedied by the statute. That this was the true reason for making the statute, will appear by the cases on the the subject, from the time of *Hobart.*(a)

I shall now notice some cases where actions similar to the present have been brought.

(a) *Green* v. *Harrington*, *Hob.* 284. *Brownl.* 14. *Hutt.* 34. S.C. *Vid. etiam* 1 *Danv. Ab.* 28. *Actions*, (O.)

The case of *Dartnal* v. *Morgan*(b) was an action of *assumpsit:* "Whereas the plaintiff *locasset* to the defendant a certain warehouse, the defendant assumed "to pay him, for every week that he occupied it, eight "shillings; and alleges, in fact, that he occupied it "twenty-seven weeks; for which, upon not paying "upon request, the action was brought. Upon *non assumpsit*, and verdict for the plaintiff, the defendant "moved, in arrest of judgment, that this is a lease, (at "least at will,) and the eight shillings weekly is in nature of rent, and for rent reserved in the lease, (which "sounds in the realty,) *assumpsit* lies not; nor for "debt upon a specialty, or upon record. But here, "forasmuch as this is not a lease, but a *promise*, "that as long as he permitted him to occupy the warehouse he would pay it, it is not any rent, but merely "a promise in consideration of occupying, &c. Where-"fore this action well lay; and it was adjudged for the "plaintiff."

(b) Cro. Jac. 598.

The case of *Bard* v. *Bard*(c) was also an action of *assumpsit*, in which the plaintiff declared upon an *insimul computassent*, concerning the arrearages of rent issuing out of defendant's land, and about payment of a legacy due to the plaintiff by his father's decree. The defendant pleaded *non assumpsit;* and found against

(c) *Ibid.* 603.

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him, and, on motion, in arrest of judgment, the plaintiff had judgment; for that they accounting together, and the defendant promising to pay, was a sufficient cause of action.

In *Sleeck* v. *Bowsal*,(a) the plaintiff declared in *assumpsit*, for that whereas the defendant was indebted to him in the *5l. pro redditu ante tunc debito*, the defendant promised to pay that *5l.* whenever required; and alleged in fact, that, after such a day and year, he made a request, and the defendant hath not paid him. Defendant pleaded *payment;* and found against him. And it was moved, in arrest of judgment, that the declaration was not good, because he doth not shew when the rent was due, nor for what term, nor upon what contract. Yet, because the defendant had taken notice thereof, *affirming he had paid it*, and issue thereupon, and found against him, the declaration is made *good.*

(a) *Cro. Jac.* 668.

How v. *Norton*,(b) was also an action of *assumpsit*, in consideration the plaintiff would permit the defendant to enjoy such land, and that he permitted him to enjoy it three years, and that it was worth 10*l. per annum.* After verdict for the plaintiff, it was moved, in arrest of judgment, 1st. That it does not appear that the plaintiff had any title to the land; 2d. If he had title, that *debt* lies, and not *this action.* But the Court held the contrary on both points, and gave judgment for the plaintiff. This case appears to me to be expressly in point, there being no other difference that I can perceive, than that it was after a verdict; whereas, in the case before us, there is a demurrer to evidence. But if the Court, when substituted for the Jury, find the evidence sufficient to maintain the issue on the part of the plaintiff, the effect appears to me to be the same as if the Jury had found a general verdict for him.

(b) 1 *Lev.* 179.

Professor *Wooddeson*, speaking of the action of *assumpsit*, (vol. 3. p. 152.) says, "We have heretofore seen "that it cannot be brought on a writing under seal;

" therefore, for example, not on an indenture of lease " for the rent thereby reserved. Neither, as it was an- " ciently said, will the law *imply* any promise to pay the " rent in a parol lease; for, in the technical phrase, the " demand savours of the realty, and there are other " remedies; by action of *debt*, though that too is a person- " al action, and by *distress*. But if there be in fact a *col-* " *lateral* and *express promise* to pay the rent, *and no* " *deed executed under seal*, it may be recovered in this " mode; because it appears, that the promiser intended " to give the plaintiff this additional remedy. This ac- " tion is also maintainable, to obtain a recompense for " the *occupation* of the plaintiff's land, by his permis- " sion, where there is *no stipulation for any precise* " *rent*. The declaration states a promise of the de- " fendant to pay so much as the landlord reasonably de- " served to have for such permission; which promise " may be implied by law. For, there being no *certain* " rent, the plaintiff could neither distrain, nor, proper- " ly, perhaps, bring an action of debt; this seems the " plaintiff's genuine remedy. If, therefore, it may be " allowed at all, the promise may well be implied; and " though a precise rent was agreed for, (and consequent- " ly there was an actual promise of payment, which, " however, the plaintiff has not evidence to prove,) yet, " *in this way*, he may recover satisfaction. Scarce any " thing is more usual than such an action of *assumpsit* " for the use and occupation of the plaintiff's house by " his permission, which also being a real estate, the " same objection, if any, might in that case be alleged " against *implying* a promise of making adequate com- " pensation." In the present case an *express promise* to pay the plaintiffs to their *satisfaction* has been proved; but were it otherwise, according to the opinion of Judge *Buller* himself, in the case of *Birch* v. *Wright*,(a) the action may be maintained either upon an express, or an

(a) 1 Term R. p. 387.

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Eppes's Executors v. Cole and wife.

implied contract; for which he cites the authority of Lord *Mansfield*, in the case of *Carmier* v. *Mercer*, which I have never seen.

I am, therefore, of opinion, that the judgment be affirmed.

Judge ROANE. As the declaration in this case states an *express* promise to pay for the use of the land of the appellee, of which it is further stated, "he had, before "that time, *by the permission and* ASSENT of the appel-"lant, had the use and occupation," I have no doubt but that the action is sustainable. But, understanding that the point presented by the case of *Sutton* v. *Mandeville* is, whether this action is maintainable without proof of an *express* promise, I have not anticipated the consideration of that question; though I doubt not that the doctrines mentioned by the Judge who preceded me, on that point, are correctly stated.

Upon the demurrer to evidence I think the District Court decided correctly, and am for affirming the judgment.

Brown *against* Crippin and Wise.

Monday, 9th October, 1809.

THIS was an appeal from a decision of the Superior Court of Law,(1)held for the county of *Accomack*, on the 6th of *May*, 1809, refusing to grant a *mandamus* to the County Court of *Accomack*, commanding that Court to remove a cause to the Circuit Court of the *United States*, for the District of *Virginia*, on the grounds stated in the petition of the applicant.

The case was this: *Samuel Crippin* and *John E. Wise*, joint merchants and partners, under the firm of *Crippin* and *Wise*, brought an action of trespass against *Thomas Brown*, for taking and carrying away the goods and chattels of the plaintiffs; and laid their damages at *ten thousand dollars*. On affidavit of one of the partners, that the defendant had taken a schooner of their property, with certain goods on board, and that in the event of a recovery, they would not be able to obtain the effect of their judgment, *the defendant not being a resident of this State*, a magistrate, by endorsement on the writ, directed *bail* to be taken, which was accordingly given by the defendant.

The writ was returnable to the *February* term, (which in that County is a Court of Quarterly Session,) and at the *March* Court following, (31st of *March*, 1809,) the defendant, by his attorney, preferred a petition to the Court, in which he stated that he was a lieutenant in the navy of the *United States*, and a citizen of the State of *Pennsylvania*; that a writ of trespass *de bonis captis*

(1) By an act of the General Assembly, which took effect on the first of *January*, 1809, a Superior Court of Law is to be held by one Judge, in each County, in lieu of, and possessing the jurisdiction of the District Courts, formerly established.

1. It is a matter of *right* in the defendant, who is a non-resident of a State, and is sued in a State Court, to remove the cause to the *Circuit Court* of the *United States*, for such State, on complying with the terms prescribed by the act of Congress; and if the inferior Court refuse to allow the removal of the cause, it may be compelled by *mandamus*, emanating from the *Superior Court of the State*, not from the *Circuit Court of the United States*.

2. Bond and security, for complying with the requisitions of the act of Congress, on removing a cause from a State Court, to the Circuit Court of the *United States*, may be given, though the defendant be not personally present.

3. The Court of Appeals will direct their clerk to grant a certificate of their judgment, during term time, if it be absolutely necessary to attain the justice of the case.

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et asportatis, had been issued against him, from the office of the Court of *Accomack* County, by *Samuel Crippin* and *John E. Wise*, merchants, (which writ is prayed to be taken as part of the petition,) in which damages were laid at *ten thousand dollars*, and the petitioner held to bail on the execution thereof, by virtue of an endorsement made by a magistrate, grounded on an affidavit which states the petitioner *not to be a resident of this State.*

The prayer of the petition was, that the cause might be removed to the next Circuit Court of the *United States* for the District of *Virginia*, pursuant to the act of Congress, in that case made and provided; the petitioner further stating, that he was ready, with good and sufficient surety, for his entering in such Court, on the first day of its session, copies of such process against him, and also for his there appearing and entering special bail in the cause, if required.

The County Court refused to permit the removal of the cause, on two grounds; 1st. "Because it was not shewn to them that the defendant was an alien, or a citizen of "a State other than the State of *Virginia*." 2dly. "Because the defendant was not personally present to execute a bond, conformable to the 12th section of the "act of Congress, entitled '*An act to establish the Judicial Courts of the United States*.'"

The defendant, by his counsel, offered, as proof of the *first* point, [his being a citizen of another State,] the writ and endorsement thereon, in the cause. He also offered parol proof of the declarations of the defendant, both before and after the issuing of the writ, that he was a native of *Philadelphia*, in the state of *Pennsylvania*, and a resident of that city, where his father then resided; and also of like declarations as to the residence of the defendant, from the crew of the gun-boat commanded by him. As to the *second* point, he tendered certain persons as sureties, acknowledged by the Court to be good and sufficient, but who, the Court said, could

not be " taken without the defendant was also present to " execute the bond in person."

At the Superior Court of Law, for the County of *Accomack*, held on the 6th of *May*, 1809, the defendant moved the Judge of that Court for a *mandamus* to the County Court of *Accomack*, commanding that Court to remove the cause to the Circuit Court of the *United States*, on the above statement of facts appearing in the record. But the Court being of opinion that there was no error in the decision of the County Court, refused to grant the *mandamus*. From which decision an appeal was taken to this Court.

Hay, for the appellant. 1st. The County Court ought to have allowed the prayer of the petition; the defendant having brought himself within the *express* terms of the act of Congress.(*a*) Neither of the reasons assigned by the Court, for their refusal, are sufficient. As to the fact of *non-residence*, it was established not only by the plaintiff's own affidavit, endorsed on the writ, but was proved by other evidence. The objection that the defendant was not *personally* in Court to join in the bond, has no weight; for neither the words nor the policy of the act require his presence, and all the purposes of the law may be attained without it; as by a bond executed by others, or by a deed of trust, or a deposit of money, &c. Besides, it might be highly inconvenient to require the presence of the party; because, being a resident of another State, he would be compelled to wait till the meeting of the Court, however distant it might be from the time of serving the writ. But the language of the 12th section of the judicial act of Congress, differs from that formerly used in our statute, which required the *party* to enter into bond. This law, however, having been found inconvenient, it was provided that bonds for prosecuting appeals, writs of error, *supersedeas*, *certiorari*, or *any other cause*, may be

(*a*) See *L. U. S.* vol. 1. p. 56. s. 12.

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given by any *responsible person and security*, though not a *party*.(a)

2d. This provision for removing a cause from a State Court, where a non-resident is a party, is a wise one, calculated to avoid the effect of those prejudices which too often exist; and which have been manifested by the refusal of the Court, in the present case. It is a *privilege*, a *right*, which the law gives, and, in withholding it, the Court erred. The only way in which the error of the County Court could be corrected, was by *mandamus*. A writ of error or supersedeas would not lie, because they are only grantable after *final* judgment.(b) Nor would an appeal have been the proper remedy; because it comes within the meaning of the law relating to writs of error and supersedeas. An appeal will only lie from the *judgment* or *sentence* of a Court;(c) that is, from that which *decides* the cause: otherwise, there might be an appeal from a decision on an incidental point; as on a motion for a continuance, or for admitting a deposition to be read. But an appeal, if granted, would not have answered the purpose. Nothing but the record of the *motion* would have gone up. In the mean time the suit would have progressed, and the cause have been tried. If the Court above had decided, on an appeal, that the County Court did wrong, it could have reversed the *opinion* of that Court; but could have done nothing more. It might have said that the party was entitled to the privilege of removing his cause, but it would still have remained in the County Court. There was no mode by which the judgment of the Superior Court could be *enforced* but by *mandamus*.(d)

(a) See 1 *Rev. Code*, p. 82. s. 58.

(b) 1 *Rev. Code*, p. 82. s. 51.

(c) *Ibid.* s. 53.

(d) 3 *Bl. Com.* 110.

It has been suggested, that this process should have been applied for to the *Federal* Court, and not to a *State* Court, under the 14th section of the judicial act. The Courts of the *United States* are authorized to issue "all "writs not specially provided for by the statute, *which*

"*may be necessary for the exercise of their respective* JU- "RISDICTIONS." But the Circuit Court of the *United States* had no jurisdiction till the cause was brought before it. When a jurisdiction has *attached* in a Federal Court, it may be *maintained*; but it cannot be *acquired* in that way. The consequences of such a clashing of jurisdictions between the State and Federal Courts would produce an eternal state of hostility. It never was contemplated that a *Federal Court* should issue process, commanding a *State Court* to do any act. It must be presumed, that all the Courts will do their duty, and act within the sphere of their own jurisdictions; and if an inferior Court refuse to exercise its proper functions, it is the duty of a superior Court to compel it. Again, the thirteenth section of the judicial act specially provides for issuing writs of *mandamus*; but they can only be directed to persons *holding office* under the *United States*; and this power is expressly confined to the Supreme Court.

No counsel appeared for the appellees.

Judge TUCKER. The appellant, a citizen of *Pennsylvania*, being sued by the appellees in an action of trespass, in the County Court of *Accomac*, was held to bail in that Court by order of a Justice of that County, founded upon an affidavit made by *Crippin*, one of the plaintiffs in that suit, stating, that *Brown was not a resident of this State*, and was about to depart the same. At the succeeding Court, *Brown* preferred a petition to the Court for the removal of the suit to the next Circuit Court of the *United States*, to be holden for this district, wherein he styles himself a citizen of *Pennsylvania*, and refers to the writ and order of bail, and offered to give security as required by the act of the first Congress, 1 sess. c. 20. s. 12. which the Court refused; first, because it was not shewn to them that the defendant was an alien, or a citizen of any other State; and, secondly, because the defendant was not per-

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sonally present to execute a bond, conformably to the 12th section of the act of Congress. Afterwards, application was made to the Superior Court of *Accomac* County, to award a *mandamus* to the County Court, commanding them to remove the cause, which was also refused; and from that decision there is an appeal to this Court.

By the act of Congress above mentioned, if a suit be commenced in any State Court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute, exclusive of costs, exceeds 500 dollars, and the defendant shall, at the time of entering his appearance, file a petition for the removal of the cause into the next Circuit Court of the *United States*, to be held in the District, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of the process against him, and also for his there appearing and entering bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State Court to accept the security, and proceed no further in the cause.

The removal of the cause in such a case is a matter of right which ought not to be refused to any defendant, who makes out his case, and complies with the terms of the law. The order for bail endorsed on the writ, obtained on the application and oath of one of the plaintiffs, and stating that the defendant was not a native of this State, superseded the necessity of any proof of that fact to the Court, on the part of the defendant. The security offered was admitted by the Court to be good and sufficient, and ought to have been accepted. The law does not prescribe that a *bond* shall be taken. A person taken upon a writ of *capias ad respondendum* may be in close custody; and while the superior Courts of this State had jurisdiction over several, and often very remote Counties, it might have been impossible to bring the defendant before the Court during the term, to give bond in the presence of the

Court. In such case, the wise provision of the act of Congress would in ninety-nine case out of a hundred be defeated. A stipulation in nature of a recognisance taken in Court, (as is every day's practice in entering special bail in the County Courts,) would have answered every purpose of the law. Both reasons for refusing the prayer of the petition were, therefore, utterly without foundation. And the refusal of the *mandamus* by the superior Court, appears to me to be equally against right. A *mandamus* is a writ of right in every case where it is the proper remedy. Being of opinion that the County Court refused to perform a duty which was enjoined by law, a *mandamus*, at that stage of the cause, was the only remedy. The defendant could neither appeal, nor obtain a writ of error, or of *supersedeas*, until the final decision of the suit, when it might be too late. I do not know that a writ of *certiorari* would lie from the Circuit Court of the *United States* to a County Court, to remove a cause under such circumstances. But of this I have no doubt, that neither the Constitution of the *United States*, nor any act of Congress, does, or can, (so long as the twelfth article of the amendments to the Constitution of the *United States* remains in force,) deprive the superior Courts of this Commonwealth of that control over the proceedings of the inferior Courts, which the laws of this country give to them. I have therefore no doubt of the right of the Superior Court of *Accomac* to grant the *mandamus*, nor that it erred in refusing it. I am therefore of opinion, that the judgment be reversed, and the cause sent back with directions to that Court to award the writ of *mandamus*.

Judge ROANE concurred, as to the judgment agreed to be entered. He said he thought it a very *plain case*.

Judge FLEMING said it was the unanimous opinion of the Court, that the judgment of the Superior Court of Law, for *Accomac* County, be REVERSED.

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"Judgment of the Superior Court of Law, for *Accomac* "County, reversed, with costs; and ordered, that a *man-* "*damus* be awarded to the Justices of the County Court "of *Accomac*, commanding them to grant the prayer of the "appellant's petition for the removal of the suit into the "Circuit Court of the *United States*, held in *Richmond*, "upon his offering good and sufficient surety for his enter- "ing in such Court, on the first day of its session, copies "of the process against him, and also for his there appear- "ing, and entering special bail in the cause; *which surety* "*it is the duty of the said County Court to accept, although* "*the appellant himself may not be personally present.*"

☞ On the suggestion of Mr. *Hay*, that the effect of the above judgment might be lost if it were not certified before the rising of the Court, inasmuch as the County Court of *Accomac* might proceed to the trial of the cause, the clerk was directed to furnish a certificate *instanter*.

Monday, October 9, 1809.

Syme and others *against* Montague.

1. If a defendant at law be ruled into a trial in the absence of some of his witnesses, to whose materiality he has made affidavit, he may except to the opinion of the Court, and proceed to obtain relief in a superior Court of *Common Law, but not in Chancery.*

THE only points which the Court deemed it necessary to consider in this cause, were,

1st. Whether, after a trial and verdict at law, a Court of Chancery could interpose, on the ground that the defendant was ruled into a trial, in the absence of some of his witnesses, to whose materiality he had made affidavit; and,

2. It is no ground for relieving in equity either the principal or the sureties in a forthcoming bond, that the principal was not the owner of the property specified therein, or had only a *qualified* interest.

2dly. Whether, if a defendant in an execution gives a forthcoming bond for property which does not belong to him, or in which he has but a qualified interest, his securities in such forthcoming bond can be relieved in Chancery, on that account.

Montague recovered a judgment against *Syme*, for work and labour performed as a carpenter. An execution issued, which was levied on some negroes, and *Syme* and others, his sureties, entered into a forthcoming bond for their delivery to the sheriff, at the time and place of sale. *Syme* and his sureties then obtained an injunction from the Chancellor of the *Richmond* District, (the late Mr. *Wythe*,) stating, among other things, that *Syme* had been ruled into a trial of the action at law, although he had made affidavit of the absence of *some* of his witnesses, and of their materiality; in consequence of which a judgment for much too large a sum had been rendered against him; and that the negroes taken in execution were, in fact, not his property, but had been settled in a marriage contract upon two of his daughters. The Chancellor dissolved the injunction, and finally dismissed the bill. *Syme* and his sureties appealed to this Court.

After argument by *Warden* and *Randolph*, for the appellants, and by the *Attorney General*, for the appellee, Judges TUCKER and FLEMING (Judge ROANE declining to sit in the cause) delivered the following opinions.

Judge TUCKER. This case, stript of all the unimportant allegations and evidence contained in the record, appears to be simply an application to the Court of Chancery to set aside, and reverse the proceedings and trial at law, for errors alleged to have been committed there. The reasons assigned by the Chancellor in his decree, for dissolving the injunction and dismissing the complainant's bill, "that "if the Court, before which the verdict was found, in the "action at common law, erred in rejecting the motion for a

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" continuance, the Court of Chancery for that reason award-
" ing a new trial, would usurp jurisdiction impertinently;"
and " that if the verdict were contrary to evidence, or
" were found upon insufficient evidence, application, which
" ought to have been to the Court where the trial was had,
" was with like impropriety addressed to the Court of Chan-
" cery for such other trial," are conclusive as to *John Syme*, the defendant in that suit. As to the other defendants, how friendly soever their motives might have been for becoming *John Syme's* security in the forthcoming bond, to prevent the sale of property taken to satisfy an execution against him, though belonging wholly or in part to other persons, neither law nor equity can, I conceive, regard them in any other light than as securities for a debtor, who by giving a bond, reciting (as is the usual form) that the execution was levied on certain slaves, the property of the debtor, are, as well as the debtor, estopped from setting up any title adversary to that of the debtor. Their becoming his security, with any view to defeat the plaintiff's lien on the slaves taken as his property, would be such an intromission into the cause, as would not be permitted, in any Court, in favour of persons who did not claim the property as *their own*. They do not pretend any right to it themselves. They undertake for the production of it, as the property of the debtor on the day of sale. Whether the property were worth little or much, and whether *Syme's* interest therein were entire, or merely temporary, the not producing it according to the condition of the obligation subjected them to the payment of the whole debt. Nor do I conceive it competent to a Court of Equity to make any inquiry either of the actual value of the slaves, nor whether *Syme* had an absolute, or merely a qualified and temporary property therein. For those reasons I am of opinion the decree ought to be affirmed.

Judge FLEMING. I have perused and considered this lengthy record with great attention, and can discover no

error in the decree. The reasons of the Chancellor for not meddling with the trial, and judgment at law between *Montague* and *Syme*, are cogent and satisfactory. As to the other plaintiffs, who were securities in the *forthcoming bond*, (the judgment on *which* they have sought to be relieved against,) Mr. *Randolph* contended, that they are entitled to relief, in consideration of the qualified interest *Syme* had in the negroes taken in execution; and took a distinction between a case where the insufficiency of the property to satisfy an execution, might arise from the qualified interest the debtor had in the property, and a case where the property *itself* might be insufficient for the purpose; but to me it seems a distinction without a difference: and, of whatever value the property might be, the bond taken for its forthcoming at the day and place of sale, became forfeited, if there was a failure in its delivery; and the securities became liable for the amount of the debt. I therefore concur in the opinion that the decree be AFFIRMED.

Monday, October 23, 1809.

Jones's Devisees *against* Carter.

1. Where two joint-tenants, of full age, and labouring under no legal disability, make *partition* of a tract of land, by deed, according to an old survey, (both being equally ignorant of its accuracy, and no fraud or misrepresentation appearing,) such division, however unequal, is binding on them and their assigns.

2. If *I. J.* purchase, at so much per acre, of *C. C.* "all a certain tract of land, *called* by a certain name, *situate* in the County of *L. conveyed* to the said *C. C.* by *R. C.* by deed of a certain date, *said* to be a moiety of a larger tract granted to an ancestor of *R. C.*, and *comprehending* the lots and land laid down in a certain survey," this is a purchase by *metes and bounds*, by virtue of which *I. J.* is entitled to no more than the land within the limits of such survey.

THE statement of this case will be found in the following opinion delivered by Judge TUCKER, after argument by *Hay* and *Randolph*, for the appellants, and by *Wickham*, for the appellee :*

Judge TUCKER. *Joseph Jones* brought a bill against *Robert Carter*, of *Nomini*, stating, among other things, that

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* *The counsel for the appellants argued*, 1. That *Joseph Jones*, under the agreement with *Charles Carter*, and the deed from him, occupied his place, and was entitled to the same relief against *Robert Carter*, as would have been afforded to *Charles Carter*, had he not conveyed; 2. That *Charles Carter* would have been relieved from the partition of the land, it having been founded on mistake.

If it be objected, that *Jones* purchased by *metes and bounds*, the answer is, that the conveyance is of *all Charles Carter's interest in the Goose Creek tract*, comprehending such and such lots; but it does not follow, that nothing but those lots was conveyed. As to the construction of deeds, the following authorities were cited. 2 *Bl. Com.* 379. 1 *Atk.* 8. 3 *Atk.* 136. 4 *Com. Dig.* 163. tit. "FAIT." (E. 4.) 7 *Term Rep.* 641. 14 *Vin.* 57. 79. *Cowp.* 724. 3 *Hen. & Munf. Tabb* v. *Archer*, *&c.*

A partition, to be effectual, must not only be by deed, but must contain clauses of conveyance. 1 *Rev. Code*, 156, 157. 2 *Bl. Com.* 323. 16 *Vin.* 220.

The deed is executed by *Bushrod Washington* only, who states, that he was acting *for* his principal; but, to be binding, it ought to have been executed by all the parties. The name of the principal should have been signed, as acting *by Bushrod Washington*, his attorney. 9 *Co.* 76. b. *Combe's* case. 1 *Stra.* 705. and 2 Lord *Raym.* 1418. *Frontior* v. *Small.* Also 6 *Term Rep.* 176. *White* v. *Cuyler.*

3. No particular form of words is necessary in the signature of a deed by an attorney in fact; provided the act be done in the name of his principal It is therefore indifferent whether he sign it "*B. W.*, attorney *for R. C.*," or "*R. C. by B. W.*, his attorney."

** See *Wilks and another* v. *Back*, 2 *East*, 142. S. P.

Charles Carter, of *Ludlow*, claiming a right to part of a tract of land in *Loudon*, containing by patent 11,375 acres, brought a writ of right for the same, which was compromised at the trial; in consequence of which, *Robert Carter*, in the month of *August*, 1789, executed a conveyance to

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The counsel for the appellee (*Robert Carter*) contended, that from the terms of the agreement between *Joseph Jones* and *Charles Carter*, it was clear that the latter only meant to convey the part which he held in severalty, *by metes and bounds*, for the consideration of "*three dollars per acre*." Even if *Robert Carter* had committed the grossest fraud on *Charles Carter*, *Jones* would have had no right to complain, because he had not been injured. He got all the land he purchased and paid for, at a stipulated price per acre.

But, if the partition could be set aside, because of its inequality, (which cannot be seriously contended,) still no decree could be made till the representatives of *Charles Carter* be brought before the Court; for *Jones's* devisees cannot expect to recover *more land* without paying *more money*, and no persons would be entitled to receive it but *Charles Carter's* representatives. Suppose an error in the partition should be discovered in favour of *Charles Carter*, *Jones's* representatives would not be liable, because he bought *by the acre*. Suppose a recovery against *Robert Carter* and the money paid to *Jones*; it would not be obligatory as to *Charles Carter's* representatives; because none but parties or privies can be bound by a decree.

Jones is in the character of a plaintiff in equity; and it is immaterial whether the *legal* title passed by the signature of *B. Washington*, only, or not; for Courts of *Equity* will consider that as done which ought to have been done. But, in fact, it was binding at law, and an action might have been sustained setting forth the agreement. The authorities cited on the other side, only apply to cases where a power of attorney is given to seal a deed.

As to the objection, that there are no words of conveyance; any thing which shews the intention of the parties to pass an estate immediately, is sufficient. 2 *Wash.* 58. *Currie* v. *Donald.*

The parties agreed to divide by *Garland's survey*. This they had a right to do, and each to take his chance. With the plats before them they make an unequal division; and if the share of one contained more acres, that of the other was probably more valuable.

All that the Court could do would be to permit the plaintiffs to amend their bill; but, the case being clearly with the appellee, the bill will be dismissed as to him, as was done a few days ago, in the case of *Braxton* v. *Gaines*.

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Charles Carter in fee-simple, for a full and perfect moiety of the land contained in the said patent. That on the 18th of *December*, 1794, *Charles Carter* conveyed to the plaintiff in fee-simple, for a valuable consideration, "all that tract "of land called *Goose Creek Tract*, situate and being in "the county of *Loudon*, *conveyed unto the said Charles* "*Carter*, by *Robert Carter*, by deed bearing date the 14th "day of *August*, 1789, and was said to be a moiety of the "tract granted to an ancestor of *Robert Carter*, in the year "1727, and to contain 11,375 acres, *and comprehending* "*the lots* and land, as laid down in a plat of land or sur-"vey by *William Garland* in 1755, numbered 15," &c. That the whole of the first mentioned tract contains a greater quantity than was expressed in the patent. That, without a survey being again made, and upon the *representation* of *Robert Carter*, *Charles* TOOK POSSESSION of the before-mentioned *lots*, *upon the belief that they contained* a moiety of the tract, which was agreed to be given on the compromise to him: whereas the plaintiff expressly charges, that the said lots do not by any means contain a moiety of the tract, nor even more than 4,871 acres, according to a late survey by one *Thornley*, thereto annexed and referred to. That the *plaintiff* hath applied to *Robert Carter* to consent to an equal division, according to the tenor of his agreement with *Charles Carter*, and the deed executed at the time of the compromise; but that he refuses to make up the deficiency of the moiety. He then interrogates the defendant, whether the intention of the compromise was not to give *Charles Carter* a full moiety of the land? Whether the part he received be equal to a full moiety? and whether the part so received was not *understood* between the parties, to be a *full moiety?* and prays that a fair and equal partition may be made, and that *he*, as a *purchaser*, may obtain the deficiency, and for general relief, &c.

Robert Carter answers, admitting the compromise, and his deed of the 14th of *August*, 1789, conveying to *Charles*

one undivided moiety of the tract of land. He then states that, soon after that conveyance, he authorized *B. Washington* to make a division thereof, with *Charles Carter*; that a division was agreed on between them, by writing under the seal of *Charles Carter* and *B. Washington*, a copy whereof is annexed and prayed to be taken as a part of the answer. That he is not able to *find* the *original*, but doubts not he shall be *able to prove* the copy above referred to, to be a true one. He cannot at present exactly fix the date of the said agreement, but saith that it must have been on or before the 26th of *June*, 1790, as the copy above referred to was enclosed in a letter from *B. Washington*, now in his possession, and bearing date on that day. That it will appear thereby, that the land was divided by a survey made by *W. Garland*, in 1755, laying it off into separate lots, which were numbered, and refers to a copy of that survey, distinguishing all the lots that fell to *Charles Carter*. That he never heard *Charles Carter* objected to the division after it was agreed on, or that he ever alleged that agreement ought not to bind him. He admits that *Charles's* part did not contain so many acres as his part, but that it was supposed to contain better land. That he is well assured *Charles* could not be ignorant that his part contained less land than the defendant's part, *as the quantity of land in each was laid down in the survey;* and that the *quality* of the land was his inducement to *take* the part assigned him. He submits to the Court, whether the plaintiff can have any colour of right against him, when it appears, from the deed referred to in the bill from *Charles Carter* to the plaintiff, that the latter did not purchase an *undivided* moiety, or any interest *in common with the defendant*, but a separate and distinct tract of land, laid off by *metes and bounds*, which will be found on inspection to agree exactly with those by which the division between *Charles Carter* and the defendant was made.

The deposition of *John Tyler*, the only witness in the cause, states, that he was called on in *June*, 1790, by

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Charles Carter and *B. Washington*, to give them information respecting the *value of the lots* in the *Goose Creek Tract*, held by *Robert Carter*, which they were then about dividing, and which he understood they were dividing by the lots held by the defendant's tenants, *that* being the *mode talked of* when he left them. The next day he met with them both; that both told him they had made the division, and that the quantity fallen to *Charles* was something upwards of 5,500 acres. Being asked by the plaintiff what he thought the difference of value in the two tracts, he answered, that at the time of the division it was his opinion, that *Robert Carter's* part was worth 500*l.* more than *Charles's*, and that it is still his opinion; that *Charles* appeared to be satisfied, and expressed no disapprobation of the division. Being asked how the lands allotted out to the tenants held out under *Charles*, he answers, that two lots held by himself fall short 58 1-4 acres of the quantity mentioned in his lease. The Chancellor dismissed the bill.

A deed of bargain and sale from *Charles Carter* to *Joseph Jones*, dated *December* 18, 1794, among the exhibits, recites, that *Charles Carter*, on the 9th of *October* before, had contracted with Mr. *Jones* for the sale of *his* tract of land in the County of *Loudon*, at the price of three dollars per acre, and, in consideration thereof, had bargained and sold "*all that* tract called the *Goose Creek Tract*," in the terms recited in the bill, as already noticed; *comprehending* the lots of land, as laid down in a survey by *William Garland*, made in the year 1755, numbered 15, &c. and the lot called the *reserved land*, binding on *Goose Creek*, &c. in the usual form of such conveyances.

The deed of partition, (referred to in the answer of *Robert Carter*,) which is without date, recites, that *Charles Carter* and *Bushrod Washington*, appointed by *Robert Carter to divide* the *Goose Creek* tract of land, in the County of *Loudon*, on the part of the said *Robert*, have agreed, and do by these presents agree, that the said tract be di-

vided as follows, viz. beginning, &c. reciting a number of courses and distances; and that *these courses*, including lots No. 15, &c. in all 5,552 1-2 acres, the part, parcel or dividend, included within those boundaries, it is agreed, by and between the parties, shall belong to *Charles Carter; all the rest* and residue of the said *Goose Creek Tract*, bounded *by the line* of the said *Charles*, from the letter A., &c. to the beginning, at A., it is agreed by and between the parties, shall belong to the said *Robert Carter; reference being had to the* said survey and plat of *William Garland*, the boundaries and division of the said land will more fully appear. This deed is sealed with the seal of *Charles Carter*, and with that of *Bushrod Washington, attorney for Robert Carter;* but there is neither date, nor any witness to the execution of it. This instrument is sufficiently recognised by *Robert Carter* in his answer, to give it effect, as *his* deed; but there is no proof of the execution of it by *Charles Carter*, any where in the record, that I can discover; though, in the argument, I do not recollect that any objection was made to it on that ground. The bill does not notice it. *Charles Carter's* deed to Mr. *Jones* creates a STRONG PRESUMPTION, however, that it *was executed* by him; for the lots of land particularly designated as the property of *Charles Carter*, are numerically the same in BOTH; and the bill charges that *Charles Carter took possession of them* upon the belief that they contained a moiety of the *Goose Creek Tract*, of which he was to have an undivided moiety by virtue of the compromise. The execution or non-execution of this instrument, or deed, by *Charles Carter*, appeared to me at first to be indispensably necessary to be proved or admitted upon the record, in order to a just decision of the cause; for though, by the common law, parceners might make partition by agreement between them, as well by parol without deed as by deed, yet joint-tenants could not; nor could tenants in common make a partition by *parol*, unless they *executed the same* in severalty by livery of seisin;(a) The bare entry of *Charles*

(a) *Litt.* sect. 250. *Co. Litt.* 169. a.

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Carter into the lots in the bill mentioned, though upon the *representation* of *Robert Carter*, as charged in the bill, and under a belief that they contained a moiety of the tract, is not evidence of such a partition, as both the common law and our statute law require. And without such evidence, I was inclined to think the cause was not ripe for a decision; but my scruples have been in great measure removed by the opinion of the other members of the Court.

I shall now consider the case upon the ground, that the deed of partition was duly executed by *Charles Carter*, of the one part, and by *Bushrod Washington* as the agent and attorney of *Robert Carter*, on the other.(*a*)

(*a*) 9 Co. 74.

In that case, it would operate either as a *legal conveyance* of the lands, set apart for the parties respectively by metes and bounds, as in the deed mentioned; or as an *executory* agreement to make the partition agreeably to those metes and bounds.

By the common law, if parceners make partition between them of lands in fee-simple, by agreement, either by deed or by parol without deed, being all at the time of making the partition, at full age and unmarried, and of sane memory, it is good and firm for ever, although the values be unequal.(*b*) And if two parceners of lands in fee marry, and their husbands make partition between them, if the part of the one be less in value than the part of the other, during the lives of their husbands, the partition shall stand in force. But, although it shall stand during the lives of the husbands, yet, after the death of the husband, she who hath the lesser part may enter into her sister's part, and defeat the partition. But though the partition is unequal, yet it is not *void*, but *voidable;* for if, after the decease of the husband, the wife *entereth* into the unequal part, and agreeth thereunto, *this shall bind her.*(*c*) And the law is the same where one of the coparceners happens to be an infant at the time of the partition made;(*d*) but this is only where the partition is unequal, and the infant has the lesser part: and even then it is not *void*, but *avoidable* by

(*b*) *Litt.* sect. 250. *Co. Litt.* 166. a. 169. a. *Litt.* sect. 255.

(*c*) *Litt.* sect. 256. *Co. Litt.* 170. b.

(*d*) *Ib.* sect. 258.

his entry; for if he take the whole profits of the unequal part after his full age, the partition is made good for ever.(*a*) But though parceners might by the common law make partition between them, without deed, yet joint-tenants could not; nor could tenants in common make partition by parol, unless they executed the same in severalty by livery; and this appears to be the only distinction between partitions made by parceners, or by joint-tenants, or tenants in common.(*b*)

(*a*) *Co. Litt.* 171. a. b.

(*b*) *Litt.* sect. 290. *Co. Litt.* 187. *Ib.* sect. 318. *Co. Litt.* 198. b.

According to these authorities, if this deed be regarded as operating as a conveyance by the common law, the parties thereto being at the time of full age, and no fraud or imposition on either side; and *Charles Carter* having moreover entered and taken possession of the part allotted to him, the partition, though it should be unequal, is nevertheless binding and valid for ever. By recurrence to dates, it would appear, that his possession thus acquired must have continued upwards of four years before Mr. *Jones's* purchase. Consequently, at the time of selling, *Charles Carter*, if the deed shall operate as a legal conveyance, was concluded thereby, and by his entry and possession of the lands therein mentioned, from claiming any other part of the original tract.

But it is contended, that this deed cannot operate as a *legal* conveyance, there being no words in it sufficient *to pass an estate* from one to another, but containing merely words of covenant and of future operation. But there are cases where a covenant may operate as a release,(*c*) and I think this is one of them; each party releasing all his right to the part of the land assigned to the other. But suppose it were otherwise, what then must be its effect as an executory agreement in a Court of Equity?

(*c*) *Ambl.* 250.

The rule that equity follows the law appears to me to be peculiarly applicable to the present case. We see that unequal partitions are not void, but voidable only, under certain circumstances of inequality, where the party, to whom the lesser part may be allotted, is under any disa-

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bility at the *time* of the partition being made. We have seen also, that, although *voidable* in such cases, the subsequent entry and agreement of the party having the lesser part, after the removal of his disability, renders that valid and good for ever which was voidable before. And that, where all the parties are of full age, and under no disability, the partition, though unequal, is nevertheless binding upon them for ever. If the object of the present bill were to carry this agreement into effect, the Court, as a Court of Equity, would decree a conveyance, in conformity to the agreement itself, and not otherwise, without regard to the inequality, unless it were produced by fraud or surprise; because the parties, by their solemn deed, have expressed their intention to make a partition in such a manner as the law would approve, if it were made by a legal conveyance. The Court would reject any defence made upon the ground of a mistake either in quantity or value, where both parties were equally ignorant, or acted with full knowledge of the nature of the evidence before them; as in the present instance, where both parties refer to a plat and survey made in 1755; of any errors in which both were equally ignorant. Nor is there any proof, that I see, that it is erroneous, except in one instance, of no great importance. If, then, equity would have decreed a specific performance if it had been asked, will it now annul the agreement between the parties, because of this supposed inequality? I conceive not. Equity will not interpose, if the fact about which a mistake happens was from its nature *doubtful*, or at the time of the agreement *equally unknown* to both parties; as, where a contract was for a piece of ground, which was to be enclosed for 20*l.* and, upon a bill for a specific performance, the defence was, that it was worth 200*l.* although the contract was to be performed, *in futuro*, yet neither party knowing the value, a performance was decreed.(*a*) *That* appears to me a much stronger case than the present, the mistake charged being *tenfold* the amount of the consideration agreed to be

(*a*) 1 *Fonb.* 116. n. 1. *Bro. Ch. Ca.* 157.

paid; whereas the inequality, in the present case, is probably very far below that, if any really exists.

My opinion, upon the whole, is, that the decree be affirmed.

Judge ROANE. The tenor of the deed from *Charles Carter* to *Jones*, evidently imports a purchase by the latter of a specific ascertained tract of land, and not a moiety of a larger tract. It recites that *Charles Carter* had contracted for the sale of "*his tract of land*" called *Goose Creek*, and *conveys* "*all that tract of land*" called *Goose Creek Tract*, &c. whereas, if an undivided moiety of a larger tract had been contemplated, he would have conveyed all that his UNDIVIDED *moiety* of the said tract. The deed, it is true, annexes the words "conveyed by *Robert Carter* to "*Charles Carter*, by deed of 14th *August*, 1789;" and if it had stopped there, there would have been greater reason to construe it a conveyance of an undivided moiety. But it proceeds thus, "*and was said to be a moiety*" of the tract granted in 1727. This last expression evidently applies to a specific tract, which is said or supposed to contain a moiety of the tract granted in 1727. Such an expression is inconsistent with a conveyance of a full and *undivided* moiety. In that case the conveyance would have been of a full and undivided moiety merely. With respect to the criticism on the term "comprehending," by the appellants' counsel, it would have been correct if a *greater* interest had been in the first place clearly shewn to have been conveyed. In that case the specification might be construed to be commensurate with the basis on which it was intended to be bottomed. Such was the case in the instance of *Tabb* v. *Archer*;(a) but, without a *petitio principii*, that construction will not fit the case before us. This construction of *Jones's* purchase is made more manifest by the reference in the deed to *Garland's* survey, and to a specification of the lots thereof, assigned to *Charles Carter*, and by him sold to *Jones*. The outward lines of those lots specify as

(a) 3 *Hen. & Munf.* p. 399.

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completely the metes and bounds of the land conveyed by the deed, as if the deed had been silent as to those lots, and had described that line by mere course and distance only. It is further to be remarked, that the sense of both these parties (*Jones* and *Charles Carter*) is manifested, as to the construction of the contract in this particular, by *Charles Carter's* entry into the particular lots assigned to him, and now held by *Jones*, and by the actual survey of their agent *Thornley*. He did not survey the whole tract, but surveyed this as a specific tract of land by the metes and bounds resulting from the lots mentioned in the deed. That survey not being objected to in the Court below is to be read here, and to have as much effect here as there. It will not be pretended, however, I presume, that a deposition not objected to in the Court below, and containing *inter alia*, for example, mere hearsay testimony, will (by the mere omission to object to the deposition in the inferior Court) exalt that hearsay testimony into legal evidence. The omission to object in the Court below only amounts to an agreement that it shall be *read* in the appellate Court to avail *quantum valere potest*. The case just put of hearsay evidence seems analogous to the one before us. In the case of *Johnson* v. *Brown*,(*a*) the *survey* in question was authenticated by the surveyor's deposition, and was made part thereof. But in the case of *Lee* v. *Tapscott*,(*b*) it was held, that a *private* survey is no evidence against those who were strangers to it. This is conclusive to shew that *Thornley's* survey is not complete to bind *Robert Carter*, if it has no greater effect in this Court than in the Court below. But what does that survey prove, even as between *Charles Carter* and *Jones*? Only that *Charles Carter's dividend* of land contains fewer acres than *Garland's survey* purported. But does it further prove, that *Robert Carter's* dividend does not also fall short in the same ratio? Certainly not; for that dividend has not even yet been surveyed; and, if it does fall short in the same ratio, no cause of action exists in *Jones's* re-

(*a*) 3 *Call*, 267.

(*b*) 2 *Wash.* 276.

presentatives, admitting them to stand precisely in *Charles Carter's* shoes, and that *Charles Carter* was not barred on this subject by the division with *Washington*. *Thornley's* survey, therefore, however it may be between *Charles Carter* and *Jones*, and in relation to *Charles Carter's* dividend of land, does not affect *Robert Carter*, nor shew that he actually stands on more advantageous ground in respect of quantity than the present appellant. The natural presumption on the contrary is, that if *Garland's* survey does not hold out as to a part thereof, it will be equally deficient in relation to the whole tract. As, therefore, neither the whole tract, nor *Robert Carter's* particular dividend of land, has been surveyed, even by *Thornley*, the case of the appellants is incomplete to shew an injury, even in the view that they are now entitled to a moiety of the tract of 11,375 acres. That survey, if made, might, on the contrary, shew unequivocally, (by *Robert Carter's* dividend being *more* deficient,) that the present appellants have no cause of action against him, but, on the contrary, that they hold land which, *on the pretension now set up*, the representatives of *Robert Carter* are entitled to recover. If, therefore, no *inequality* of partition is shewn to exist in the case before us, it is unnecessary to consider the question as upon the doctrines of the law which apply to UNEQUAL partitions; though I doubt not the doctrines stated by the Judge who preceded me are correctly stated.

This view of the case is conclusive against the present appellants. But as (to admit the most) it is doubtful whether they, or the representatives of *Charles Carter*, are entitled to the subject of the present claim, (if any one is entitled,) those representatives ought certainly to be parties before their interest in this particular can be affected. In that case *they* would have it in their power to exhibit the agreement of *October*, 1794, with *Jones*, which *he* did not think proper to do, and which therefore raises a presumption against him. As it is not, however, proper to hold out any inducements to those representatives to engage in litigation for the land now claimed, I will repeat, that,

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from this case, *as it now appears to us*, I do not see that even *they* would have any title. *Robert Carter* conveyed to *Charles Carter*, in *August*, 1789, an undivided moiety of the original tract; and, it being important that a specific *division* should take place between them, one was made in *June*, 1790. It is not shewn, nor is there the least ground to believe, that any misrepresentation or deception was practised towards *Charles Carter*, in making it. He had a long and ample opportunity to know the quantity of the land, and even to make a survey thereof. *Garland's* survey, by which they agreed to divide, being made as long ago as the year 1755, could not possibly have been made with a view to any deception in this particular; and if it had, *Robert Carter* might, in the division, have been himself injured as well as his adversary. But any such pretence is ridiculous. If the lots in *Garland's* survey have not held out, and, even if there was, in the year 1755, a *design* in making those lots appear larger than they really were, on account of the rents to be paid by the tenants, such error would run through the whole survey, and thus demolish the pretension that the other moiety (*Robert Carter's*) may *still* hold out its purported quantity, or more. With respect to the partition, division, and allotment, made by *Bushrod Washington* and *Charles Carter*, the authority of the former, *as attorney for Robert Carter*, is admitted by *Charles Carter* in the instrument of division itself; and, besides, *Bushrod Washington* seals the paper, and *annexes* his character of "Attorney for *Robert Carter*." This would seem to me, amply sufficient to make *the division* valid. In 9 *Co.* 77. a. *Combes's* case, it is held, that if *A.* "*as attorney of B.*" and shewing the letter of attorney, makes a surrender, or delivers *seisin* of a tract of land, it is sufficient. That seems analogous to the case before us. As to that instrument of partition, if the end and scope of *Jones's* bill had been for an undivided moiety of the tract of 11,375 acres, it might *perhaps* be doubted whether a *copy* of that paper, supported only by the oath of the defendant, would be competent to narrow the claim. But

such is not the end of the bill, as I have already endeavoured to shew. The bill claims a specific tract of land, of which the appellants are already in possession, and therefore the exhibition of this paper to prove the very fact *admitted* by the claim in the bill, was *unnecessary* on the part of the defendant. If this instrument of partition had not been shewn in evidence at all, the result would have been precisely the same on the shewing of the appellants. But, if this paper *was necessary* for the defence of *Robert Carter*, it does not rest upon his answer merely. It is supported by the coincidence of boundaries specified in *it*, and the bill and deed under which the appellants claim, by the entry of *Charles Carter* into the same land, and by *Thornley*, the appellant's agent, surveying by the same boundaries.

I am, therefore, of opinion, as upon the present record, that even the representatives of *Charles Carter* would have no claim to the land in controversy; and, clearly, that the present appellants have not; and that, even if they had, the representatives of *Charles Carter* should be also before the Court, in order to defend their right, or set it up in derogation of the claim of the appellants. Upon the whole I am of opinion, that the decree of dismission be AFFIRMED.

Judge FLEMING. In *August*, 1789, the compromise took place between *Robert Carter* and *Charles Carter*, when the former conveyed to the latter, in consequence thereof, *an undivided moiety* of the *Goose Creek* tract of land, *said* to contain 11,375 acres, by deed bearing date the 14th day of *August*, 1789, as stated in the bill, and acknowledged by the answer, though the deed does not appear in the record. Previous to the 26th day of *June*, 1790, a partition of the land was made by and between *Charles Carter*, of the one part, and *Bushrod Washington*, the agent of *Robert Carter*, on the other part, *by metes and bounds*, as appears by a deed without date, under the seals of the said *Charles Carter* and *Bushrod Washington*, a copy of which is stated

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and referred to in the answer, and was read at the trial as one of the exhibits, *and not excepted to;* and therefore is a próper document in the cause, and ought to have the same effect as the deed itself would have had, if produced. The division was made with reference to a survey and plat of the whole tract made by *William Garland*, in the year 1755, and divided into a number of lots, from one to forty-five inclusive, making in the whole 11,764, instead of 11,375 acres, called for by the patent; which gave a surplus of 389 acres. On the division made by Mr. *Washington* and *Charles Carter*, it appears by *Garland's* survey, that 5,551 acres were allotted to *Charles Carter*, and the residue of 6,213 acres were retained for *Robert Carter*, making a difference in his favour of 662 acres, a moiety of which, taken from 6,213 acres reserved for *Robert Carter*, and added to 5,551 acres allotted to *Charles Carter*, would give to each party 5,882 acres; so that, by *Garland's* survey, *Robert Carter* got, on the division, only 331 acres more than a moiety of the whole tract of 11,764 acres. In consequence of this division made *by metes and bounds*, previous to the 26th day of *June*, 1790, *Charles Carter* took possession of the part allotted to him, and acquiesced in the division, without any objection or murmur; and, in *October*, 1794, after a lapse of more than four years, sold to Mr. *Jones*, for the consideration of three dollars per acre, "the *Goose Creek* tract of land, in "the County of *Loudoun*, *said* to be a moiety of a tract "granted to *Robert Carter*, by deed bearing date the 30th "day of *March*, 1727, and to contain 11,375 acres." And the land is described by lots numbered in *Garland's* survey, and agreeing precisely with those mentioned in the deed of partition made by *Charles Carter* and Mr. *Washington*, on behalf of *Robert Carter*. After Mr. *Jones's* purchase, a resurvey was necessary, to ascertain the number of acres, to fix the amount of the purchase money, at three dollars per acre. A survey was accordingly made by *Aaron Thornley*, by which it appears, that, instead of 5,551 acres, according to *Garland's* survey, those several

lots contained only 4,871 acres, leaving a deficiency of 680 acres. But supposing the lots retained for *Robert Carter*, to fall short of *Garland's* survey in the same ratio, there would be a deficiency in his part of 761 acres; making the difference between the two lots still less than it appears by *Garland's* survey, and shewing only 290 1-2 acres more than a moiety, were retained for *Robert Carter*. But, however that may be, it appears to me that *Charles Carter* was bound, as well at law as in equity, by the partition made by himself and Mr. *Washington*, *by metes and bounds*, of which he never complained to the day of his death; and that Mr. *Jones*, having purchased the *specific* tract, (as appears by *Charles Carter's* deed to him of *December*, 1794,) also described *by metes and bounds*, the partition was likewise binding *on him*: and *he* had (if any) still less cause of complaint than *Carter;* as *he* purchased by the acre, and was bound to pay for no more land than was comprised in his deed.

Upon the whole, I concur in the opinion, that the decree is correct, and ought to be affirmed; and that is the unanimous opinion of the Court.

Murdock and others, surviving partners of William Cunninghame & Co. *against* Herndon's Executors.

1. When a cause is brought up to a superior Court upon a bill of exceptions, the Court will inspect the *whole record*, and, if there be *any error*, will reverse the judgment, for such error, though they may be of opinion that the Court below decided rightly on the *particular point*, on which the exceptions were taken.

THIS cause was heretofore in this Court, under a different style, and was decided on a different point.(*a*)

The original suit was an action of debt, brought in the name of *William Cunninghame & Co.* in the District Court of *Fredericksburg*, against *Edward Herndon*, upon a written acknowledgment of the defendant, that on the 18th of *August*, 1775, he had "settled his account with *William* "*Reid*, merchant in *Fredericksburg*, and found the balance "due him to be 88*l.* 7*s.*" and a written memorandum, made on the same day, and on the same paper, by *William Reid*, "that the above acknowledgment of *Edward* "*Herndon* for 88*l.* 7*s.* was to be understood due to *Wil-* "*liam Cunninghame & Co.*" The declaration stated the fact of the acknowledgment, and the memorandum thereon, which was charged as an *assignment*. The defendant pleaded "*owe nothing;*" upon which issue was joined. On the trial the defendant objected to the admission of the above writings as evidence; the Court sustained the objection; and, under the influence of that opinion, a verdict was found for the defendant. The plaintiffs appealed to this Court; and pending the appeal, the appellee, *Edward Herndon*, died, and the appeal was revived against his executors, the present appellees.

2. If a cause be remanded to an inferior Court, and a new trial directed, the superior Court must be presumed to have thought the declaration sufficient; consequently, on the new trial, or on a *second* appeal, no exception can be taken to the declaration.

This Court having reversed the judgment of the District Court, and sent the cause back with instructions to

(*a*) See 2 *Call*, 530.

3. Where a suit would have abated by the death of the plaintiff, and the defendants might have been permitted to plead *de novo*, if they omit to avail themselves of the death of the plaintiff, but, on the contrary, admit that certain persons are his surviving partners, and go to trial without asking permission to plead *de novo*, they are precluded from making the objection after verdict.

4. After verdict for the plaintiff, on the plea of *nil debet*, it is no ground for arresting judgment, that the claim, as shewn by the declaration, was barred by the act of limitations; for it will be intended that, if the act were given in evidence, the plaintiff rebutted it by some other evidence, which avoided its operation.

admit the evidence, (being of opinion *that it was proper upon the issue*,) an entry was made on the record in that Court, (on the 14th of *October*, 1803,) "*that the suit* "*abated as to William Cunninghame & Co. by his death*, "and it was *admitted that Peter Murdock, John Hamilton*, "*and James Robinson, were the surviving partners*;" whereupon a Jury was immediately impanelled, and sworn to try the "issue joined," *without any application by the defendants to plead de novo*, and a verdict found for the plaintiffs for 88*l.* 7*s.* and 294 dols. 55 cts. damages.

Errors in arrest of judgment were filed by the defendants, on the following grounds:

1. That the note and assignment, as stated in the declaration, did not entitle the plaintiffs to recover, in the form in which they had declared.

2. That it appeared by the declaration, that the demand was barred by the act of limitations.

3. And that it appeared by the record, that *William Cunninghame* was dead before the finding of the verdict.

The District Court, upon argument of the errors, gave judgment for the defendants; from which the plaintiffs appealed to this Court.

Williams, for the appellants.

Botts and *Hay*, for the appellees.

The cause was argued at *March* term last; when various points were made by the counsel for the appellees in support of those stated in the errors in arrest of judgment, which were repelled by the counsel for the appellants, chiefly on the ground that the opposite parties were precluded, by the former judgment of this Court, from making the objections at this time. And on *Friday, the 13th of October*, 1809, the Judges delivered their opinions.

Judge TUCKER. This is the same case which is reported in 2 *Call*, 530. under the title of *Cunninghame* v. *Hern-*

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don. While the suit was depending in this Court, *Herndon* died; and the cause was revived here against his executors. The judgment was finally reversed, and the Jurors' verdict set aside, "and a new trial was ordered to "be had in the cause," with directions to admit the evidence which had been rejected on the former trial.

The cause being again brought on in the District Court, the following entry appears: "This suit abates as to the "plaintiff, *William Cunninghame*," (he being the only plaintiff *named* in the declaration, which is brought in the name of *W. Cunninghame and Company*, not naming any other,) "by his death, and it is admitted that *Peter Murdock*, "*John Hamilton*, and *James Robinson*, are the surviving "partners of the said *William Cunninghame & Co.* 'where-"'upon came the *parties* by their attorneys, and thereupon "'came a Jury,' &c. who found a verdict for the plain-"tiffs."

The defendants moved in arrest of judgment, and assigned for cause,

1. That the note and assignment thereof, as stated in the declaration, do not entitle the plaintiffs to their action in manner and form as set forth in said declaration.

If this were sufficient cause for arresting the judgment, it ought to have been sooner noticed, when the cause was before this Court on the former appeal: for I understand the practice of this Court to be, that if a cause is brought up here upon a bill of exceptions, the Court will consider the whole record and proceedings, and if there be any error therein, in any other part of the record, will reverse the judgment for such error; although they should be of opinion that the particular point upon which the exception was taken was rightly adjudged below: because the appellate Court must inspect the whole record.(*a*) This Court having reversed the former judgment, which was rendered in favour of the *defendants*, and directed a new trial to be had in the cause, must be presumed to have thought the declaration sufficient; otherwise, they would have affirmed the first judgment, though not for the reasons given in the

(*a*) *Baird* v. *Mattox*, 1 *Call*, 257.

bill of exceptions, as has been often done in this Court. I therefore do not conceive that any exception can be taken to the declaration upon this *second* appeal. The practice would be highly inconvenient and vexatious, and productive of infinite delay, and of appeals without end.

2. The defendants allege, as a cause of arresting the judgment, that it appears by the declaration, that the demand is barred by the act of limitations. The plea is *nil debet*. Upon this plea it has been decided, that the act of limitations MAY *be given in evidence*. It is possible it was given in evidence on the trial, and that the plaintiffs produced other evidence, which avoided its operation; and this is the presumption of law after a verdict; so far at least as that the defendant shall not avail himself of the act of limitations in arrest of judgment. The act must be *specially pleaded*, or given in *evidence*, in cases where that is permitted; otherwise no notice can be taken of it, after a verdict.

3. They allege, that it appears by the record, that the said *William Cunninghame* was *dead* before the finding of the verdict of the Jury. *W. Cunninghame* being the only plaintiff named in the declaration, the suit ought to have been *abated*, upon that fact being shewn to the Court, unless the defendants have precluded themselves from taking advantage of it, by admitting (as the record states) that *Peter Murdock*, &c. are the surviving partners of the said *William Cunninghame & Co.* Why did they proceed to the trial after that *admission*, instead of moving the Court to abate the suit *in toto?* If they had made such a motion, I think the plaintiffs ought to have been permitted to *amend* their declaration by inserting the names of the surviving partners, intended to be comprehended under the word *Company*, according to the *admission* of the defendants. It has the air of surprise, and therefore I think ought not to receive the sanction of this Court, more especially as it is a general rule, that advantage ought to be taken of any matter by which a suit may be liable to *abate*, by way of plea *puis darrein continuance*, at the very next

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term after which the abatement happens, and, consequently, before the party proceeds to a trial; and as the defendants by their admission shew that they had notice of *Cunninghame's* death, and that there were surviving partners, whose names they also knew, I think they ought, as at *that time*, and not after the trial, to have moved the Court to abate the suit, or filed a plea for that purpose.

But there remains another point to be considered: The suit, having abated in *this* Court by *Herndon's* death, though revived against his executors *here*, and sent back for a new trial, without any directions as to the executors being first admitted to plead, has been tried upon the issue joined between *Herndon* and *Cunninghame*, in their *life-times* respectively, instead of being tried upon a new plea of the executors of *Herndon*, and issue thereon joined between the *present parties*.

At common law the original suit must have abated *in toto* by *Herndon's* death after issue joined; and so must it have done at any time before the act of 1806, (2 *Rev. Code*, 126.) which was subsequent to the reversal, and even to the last trial in the District Court. Even if the revival here might operate to revive it in the District Court, for the purpose of a new trial, yet I doubt whether there has not been such a *mis-trial* as is not aided by the statute of *jeofails*, there being no issue joined between the parties then before the Court.

Besides, upon principle,(1) it would seem, that the executors ought to have been permitted to plead to the action in the same manner as if the suit had been brought originally against themselves; for they ought to have had an

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(1) *Vide* 2 *Saund.* 72. n. *Williams's* note. "Where the defendant dies "after interlocutory and before final judgment, the plaintiff must sue "out two writs of *scire facias* to entitle himself to take out execution: "one before final judgment, to make the executors or administrators "parties to the record; the other, after final judgment, to give them "an opportunity of pleading the want of assets, or any other matter, "that an executor may plead in his defence to a *scire facias*, brought

opportunity of pleading the want of assets, or any other matter that they might have pleaded, if the suit had been brought originally against them.

Perhaps the omission of the executors to move the Court to permit them to plead, either *de novo*, or such additional plea as their counsel might have advised, has cured this error, if it be one. If the majority of the Court shall be of that opinion, I shall cheerfully acquiesce in their decision.

But, upon the whole, my opinion is, that the judgment be reversed, and the cause sent back, with leave to the plaintiffs to amend their declaration by inserting the names of the present parties, and to the defendants to plead to the action, as if it had been brought originally against them.

Judge ROANE. Upon a perusal of this case, as formerly reported,(*a*) it appears to have been the opinion of the Court, that the declaration contained a sufficient cause of action; else the judgment of the Court would not have assumed the shape it did, which was to reverse the judgment, on the ground that the District Court erred in withholding the writings, offered by the plaintiff, from the Jury. This question, therefore, was *then* settled, and is not now open for the decision of this Court: and this is a full answer to the first error assigned in arrest of judgment on the second verdict.

(*a*) See 2 *Call*, 530.

As to the second error assigned, viz. that it appears by the declaration that the said demand is barred by the act of limitations, there is nothing in it. That act is not *pleaded;* and, if it be true that it could be given in evidence on the plea of *nil debet*, (which seems to have been the ancient

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" upon a final judgment obtained against his testator; for it would be " unreasonable that the executors or administrators should be in a " worse situation where their testator or intestate died before final " judgment, than they would have been in, if he had died after." Cites *Say. Rep.* 266. *Tomkins* v. *Gratton*.

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opinion,) it may be, and therefore we ought so to take it after verdict, that the effect of this bar was rebutted and done away by proof of recent acknowledgments of the debt.

As to the third error assigned, that *William Cunninghame* was dead before the finding of the verdict of the Jury, there is a clear admission by the defendants, on the record, that the suit should proceed in the names of the surviving partners who are also specified therein.

There is, then, nothing to justify the opinion of the District Court, arresting the judgment on the verdict rendered in favour of the plaintiffs. With respect to the objection stated by the Judge who preceded me, in relation to the appellees, the executors; the appeal was revived against them while it was depending in this Court. They did not move, either in this Court or the Court below, for leave to plead *de novo;* and therefore the Court was not to volunteer such a privilege in their favour. It is *possible*, indeed, that it might have been eligible for them to have changed the plea, and pleaded fully administered. But how did the Court know this to be the case? and why not suffer parties to elect the particular grounds of their own proceedings? The plea, on which issue was joined in this case, denied the existence of the debt altogether. By what authority, then, ought the Court to have compelled, or even *permitted*, a relinquishment of that ground, (without its being asked for by the executors,) and the substitution of another plea, (that of *plene administravit*,) which, on the contrary, admits the debt, though not the *quantum* of it.(a) Why should the Court, without any motion for that purpose, and therefore, I infer, without any necessity required by the state of the testator's assets, adopt a course which would arrest the trial, and exhaust a good deal of time in maturing for trial another issue, to which the instruction of this Court would have no application. *That* instruction certainly contemplated a new trial of the *existing* issue, and not of *another* issue to be made up between the parties. This point, then, is concluded by the former

(a) *Bull. N. P.* 149.

opinion of this Court, that *this issue*, and not another issue, should be tried between the parties.

I see no necessity for the Court to have volunteered such a privilege in the case before us, however it might have been if the executors had made a motion for that purpose; and, therefore, in every light in which I can view the case, I am of opinion, that the judgment of the District Court should be reversed, and one entered for the appellants.

Judge FLEMING. The only doubt on the mind of either of the members of the Court seems to be, whether, upon the suit being revived against the executors of *Herndon*, the original defendant, and the death of the plaintiff, *William Cunninghame*, who was first named in the firm of *Cunninghame & Co.*, the former pleadings ought not to have been set aside, and the defendants allowed to plead *de novo?* To this it may be observed, that the parties went to trial on the former issue by mutual consent, or at least without any objection on the part of the defendants, they admitting that *Peter Murdock*, *John Hamilton*, and *James Robinson*, are the surviving partners of the said *William Cunninghame & Co.*, and no motion to the Court, or suggestion was made, that they wished to plead over, or to amend their plea; nor is it stated, or taken notice of, in the errors filed in arrest of judgment, which have already been recited. I am not for obstructing the course of justice (as was sometimes formerly done in *England*) by an over nice criticism on pleading, where a cause has been fairly tried on its true merits; and especially after a verdict. I am, therefore, of opinion, that the District Court erred in sustaining the errors in arrest of judgment, and that the judgment of the said Court be reversed, and the plaintiffs have judgment on the verdict aforesaid.

Judgment of the District Court REVERSED.

Tuesday, October 17, 1809.

The Commonwealth *against* Fairfax and others.

The true construction of the law, concerning the appointment and duties of sheriffs, requires that they should be *annually* nominated, and commissioned, and should *annually* give bond for the faithful collection of the taxes, &c. therefore, in this case, the high sheriff having been nominated and commissioned for *one year only*, and having acted the *second year*, without a new nomination and commission, and not having renewed his bond, held, that the securities for the *first* year were not liable for the taxes collected by the high sheriff for the *second*.

THIS was an appeal from a judgment of the General Court, overruling a motion made in behalf of the Commonwealth against the appellees as *sureties* of *Alexander White*, late sheriff of *Jefferson* County, for the taxes which accrued the *second* year of his sheriffalty, he having been commissioned, and given bond and security for the *first* year only.

White being appointed sheriff, by commission dated the 27th of *June*, 1805, on the 9th of *July* following, gave bond for the collection of the taxes, in the usual form, with the appellees his securities.

A motion was made against the securities for the taxes due and collected by *White* for the year 1806. The Court overruled the motion; being of opinion that the securities, under the different acts of assembly concerning sheriffs, and the collection of the public revenue, were bound for the due collection and payment of the taxes for the year 1805 *only*.

The Attorney General, for the Commonwealth, contended, that the condition of the bond being that *White* should faithfully collect, account for, and pay the taxes imposed by law, in his County, *during his continuance in office*, was broad enough to cover all the transactions of the sheriff while he acted in that capacity. By the 6th section of the act of 1792,(*a*) every person commissioned and qualified as sheriff, *shall* be continued in office one year after his qualification, and *may*, with his own consent, and the approbation of the executive, be continued for two years, and no longer, unless, by some accident or impediment, a succeeding sheriff shall be prevented from qualifying, in which case the preceding sheriff *shall continue to act*, till a successor be duly qualified. The uniform practice has

(*a*) 1 *Rev. Code*, c. 80. p. 120.

been to consider the securities bound, during the sheriff's continuance in office.

Wickham, for the appellees, argued, that the law evidently contemplated the *annual* appointment of a sheriff, and the duration of his office for one year only; though, with his own consent, and the approbation of the executive, he may be continued for two years. The continuance of the sheriff for the second year must depend upon some act of the executive; they must express their approbation by granting him a new commission. Though the word *continue* be equivocal, yet its obvious meaning, connected with the other parts of the law, is, that the sheriff must be reappointed.

Analogous to the appointment of a sheriff, is that of the governor; who may *continue* in office for *three* years, but he must be *annually* appointed. So, a sheriff, under the first section of the law,(*a*) must be *annually* recommended, and, of course, ought to be *annually* appointed. By giving the law this construction, every part will be consistent. The latter part of the 6th section, which is relied on by the *Attorney General*, applies only to cases where the sheriff had been duly reappointed, and acted for two years, and, by some impediment, a successor had not been qualified.

(*a*) 1 *Rev. Code*, c. 30. p. 190.

The words "*during his continuance in office*," inserted in the bond, if not required by law, cannot be extended to charge the securities beyond the legal term of the sheriffalty. But, if my construction be correct, the office continued for one year only.

The Legislature, no doubt, contemplated the renewal of the bond every year; because, from the defalcations of the sheriff, one set of securities might be very inadequate. Besides, a man might be willing to be security for *one* year, who would not agree to be bound for *two*.

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Judge TUCKER, after stating the case, proceeded:

It is to be observed, that the taxes for the year 1805, became due on the 31st of *December* of *that year*; that they could not, however, be distrained for until the first of *May*, succeeding; nor were they payable into the treasury, until the first of *October* following.(*a*) Of course, these taxes did not fall due until six months after *White* gave this bond; nor did the taxes for 1806 fall due until six months after *one year* from the time of his appointment had expired. Consequently the main question is, for what period was Mr. *White* appointed sheriff, by that commission; since the undertaking of the securities for his due collection of the taxes, must be understood as commensurate with the duration of his commission, as a collector of the revenue.

(*a*) *L. V.* ed. 1794, c. 83. s. 27. p. 132.

From an attentive perusal of the several acts on this subject, I feel no doubt, that, according to the true intent and meaning of the law, sheriffs must be *annually* nominated by the County Courts; must be *annually* commissioned by the Governor; and must *annually* give bond for the faithful collection of all taxes imposed by law in their County, and which may become due at any time during the period of one year thereafter; provided the sheriff lives until the 31st of *December*, next after such appointment, &c. Because, if he lives till that day, his deputies may collect the taxes in the same manner as if he had lived.(*b*) The undertaking of the securities to this bond must therefore, I conceive, be understood as going no further than for the faithful collecting and paying the taxes for the year 1805 only; and consequently that the judgment be affirmed.

(*b*) *Ib.* s. 29.

Judge ROANE. By the act of 1792, c. 80. the County Courts are to make *annual* nominations of sheriffs. This provision, as well as the positive limitation of the duration of the office contained in the 6th section, determines the duration of the office to be for one year only; and the ef-

fect of the bond can only be commensurate therewith. In the event of the same person being *continued* sheriff a second year, which can only be, if he is again *nominated* by the County Court, it is to be considered as a *new* appointment. The terms "*approved*" and "*continue*," used in the 6th section in relation to a *second* appointment, are precisely those used in the 1st and 6th sections in relation to an original appointment: Nothing, therefore, can be inferred from those expressions to shew that a second appointment, or a continuance in office for a second year, does not stand precisely on the footing of an original one. The sum provided in the act as the penalty of the bond, is supposed to be ample enough for a *single* year, and even for a short time longer in the event of a succeeding sheriff being prevented by accident from qualifying; but it may not be sufficient to cover also a second year; and no construction of the act can be made to extend the bond to apply to a second year, which would not equally hold if the sheriff were permitted to act for twenty years, which, in that case, would surely be unreasonable. The case at bar differs from that only in degree. On the whole, I am of opinion, that there ought to be an annual nomination, appointment, and bond. The expression in the bond "during the continuance in office," must clearly have reference to the actual duration of the office by virtue of the appointment under which the bond was taken.

My opinion is, that the judgment be AFFIRMED.

Judge FLEMING concurring;—by the whole Court the judgment of the General Court AFFIRMED.

Dunbar and Vass *against* Long's Administrator.

A writ returnable to a District Court of Common Law, might legally be executed at any time during the term to which it was returnable.

AN appeal was taken in this case, from the judgment of the District Court of *Fredericksburg*, for the purpose of settling a point of practice, stated to be of great importance to the country. It was a suit brought in that Court by the appellants against the appellee; the writ in which was executed after the first day of the term to which it was returnable. At the next succeeding Court, the cause stood as an office-judgment, confirmed at the rules held in the clerk's office intervening between the two terms; when the Court, on motion of the defendant, granted a *rule* "to "shew cause why the judgment and proceedings in the "office should not be set aside, and the sheriff's return on "the *capias* quashed." The Court, on hearing affidavits read, and after reciting that the arrest was made by the sheriff after the first day of the term to which the writ was returnable, ordered, that "the judgment in the office, and "all other proceedings had in the cause, subsequent to "the *capias*, be set aside, and that the writ and sheriff's "return thereon be quashed." From which judgment the plaintiffs appealed to this Court.

Botts, for the appellants, insisted, 1. That it was competent to the sheriff to execute the writ after the first day of the Court; inasmuch as the day after the *rising* of the Court was the day of *appearance*. As no *alias capias* could issue during the term, there would be a period when the defendant might evade the process of the Court, unless the sheriff were authorized to make the arrest between the first and last day of the term. 2. That if the service of the writ were irregular, it was too late to take advantage of it after office judgment; which can only be set aside by pleading an issuable plea.(a)

(a) *Rev. Code*, vol. 1. p. 78. c. 66. s. 28.

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Williams, contra, contended, that the writ could not be executed after the first day of the Court. All writs are made returnable to the *Court;* which necessarily implies the first day of the Court. Where the law contemplates a return of process to any particular day of the term, it is always expressly so declared; as in the case of *subpœnas* for witnesses.(*a*) After the first day of the term, the power of the sheriff to *execute* the writ ceases; but he may *return* it at any time before the *appearance* day.

(*a*) 1 *Rev. Code*, 77.

As to the objection, that there was an office-judgment, founded on the return of the sheriff, it has no weight; for the Court, at the next succeeding term, have full power to set aside any proceedings in the office which have taken place since the last term.

Judge TUCKER. The defendant in the District Court obtained a rule to shew why the judgment and proceedings in the office should not be set aside, and the sheriff's return on the *capias* against him be quashed, because the arrest was made by the sheriff of *Orange*, after the first day of the term to which the writ was returnable; the Court set aside the judgment and all other proceedings in the office, subsequent to the *capias*, and quashed the WRIT and the sheriff's return thereupon: from which judgment the plaintiff appealed.

The District Court Law (ed. 1794, c. 66. s. 21.) directs, that all writs shall be *returnable* to the *next Court*. But the 25th section declares, that the first day *after* the end of the Court *to which the process is returnable*, shall be the APPEARANCE DAY, in all process returnable to any day of the Court next preceding. In the 26th section, the sheriff is required to *return* the writ, and a copy of the bail-bond, to the *clerk's office*, BEFORE *the day of* APPEARANCE. In the County Court Law, (Ibid. c. 67. s. 17.) it is directed, that all process issuing from such Courts to bring any person to answer in any suit therein, shall be executed three days at least before the day therein men-

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tioned for the return thereof. But there is no such provision in the District Court Law. Nor can I discover any good reason, why a sheriff should be inhibited from executing a process to him directed, for ten, twelve, or even fifteen days, before the appearance day prescribed by law, if he have any opportunity of doing it. He must take care, when he does execute it, that the day of APPEARANCE BE *not yet* ARRIVED, because he is bound to return it to the office BEFORE THE APPEARANCE day. If he does so, it must of necessity be executed either before the term begins, or before it has ended, which I think is all the law requires.

The 18th section of the County Court Law, and the 23d of the District Court, which in certain cases prescribe a summons in lieu of a *capias*, throws some further light upon the subject. For in both cases it requires the *summons* to have been executed, or a copy left, ten days before the *return day*, although, according to the general directions concerning writs and summonses, it must be made returnable to the next Court. And if the defendant do not appear *at the return day*, the plaintiff may proceed against him as if he had been *taken upon a* CAPIAS. Where a term is more than ten days (as many were) even this process against persons privileged from arrests, might be executed *after* the commencement of the term, which appears to put the question out of all doubt.

But were it otherwise, I think the judgment was erroneous in quashing the WRIT as well as the return; and this for two reasons: first, because the writ itself is not alleged to have been vitious or defective, and therefore not liable, for any intrinsic cause therein apparent, to be quashed; and, consequently, not for any irregularity in the service thereof. Secondly, because, by the terms of the rule, the plaintiff was not required to shew cause why the WRIT should not be quashed, but why the RETURN thereon should not. The judgment therefore goes beyond the rule, and ought to be set aside.

I am of opinion that the judgment be reversed, and the cause remanded to the District Court, there to be proceeded on in the same manner as if the Court, on the hearing of the arguments on the rule to shew cause, had then discharged the rule, the record before this Court being too imperfect to give more particular instructions respecting the course which the District Court ought to have pursued.

Judge ROANE. By the act of 1753, reducing into one the several acts relating to the General Court,(*a*) several particular return days are *expressly* provided for process, both on the Common Law and Chancery sides of that Court. By the act of 1777, c. 17. establishing a General Court, two *several* return days in each term are also *expressly* provided for its process.(*b*) By the act of the same session, establishing a High Court of Chancery,(*c*) two return days are expressly established in each term; and the same provision is expressly kept up in the act of 1792, concerning the High Court of Chancery.(*d*) By the act of 1792, reducing into one the several acts concerning the General Court, the *first* day of the Court is *expressly* provided as the return day for its process.(*e*) The other return day, provided by the act of 1777 before mentioned, is dropped in this act, not only on account of the different organization which the General Court had now assumed, but also because it became the less necessary, from the reduced length of the sessions of the General Court. And by the 9th section of the County Court Law of 1792,(*f*) the *first* day of the term is expressly made the return day in relation to all process made returnable to the *quarterly* sessions.

(*a*) *Virginia Laws*, (ed. of 1769,) p. 294.

(*b*) *Ch. Rev.* 70.

(*c*) *Ib.* c. 18. p. 67.

(*d*) 1 *Rev. Code*, p. 63.

(*e*) *Ib.* 71.

(*f*) *Ib.* 85.

I may therefore take it as a general principle, running through all our laws, as well those now in force as those which have been altered or repealed, and, taken in relation to all the Courts, superior and inferior, and those having Chancery as well as Common Law jurisdiction, that particular return days have been *expressly* provided for their

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process. There is also a peculiar propriety and fitness in this; especially in relation to those Courts, and those cases, as to which it is provided, that a certain number of days shall elapse between the execution and *return* of the process; for otherwise, the sheriff or officer would have no criterion whereby to govern himself in the service thereof.

In the case before us, however, of process issuing from the office of the District Court, a particular return day is not *expressly* provided by the terms of the act. It remains to be seen, therefore, whether, from a sound construction of the act taken in all its parts, and on a review of all our acts *in pari materia*, the want of this *expression* is not entirely supplied.

In making this construction it is undoubtedly a circumstance of great importance, that it has been the uniform policy of all our acts on this subject, except the present act and one other, to provide by *express* words proper return days for the process of the respective Courts. There can be no reason why a diversity should exist in this particular, in relation to the process of the District Courts. It will be also a circumstance of overruling weight, if, in other acts relating to this subject, expressions entirely similar to those existing in the case before us, have been expounded by the Legislature itself, beyond all contradiction, at the same time, and in the same acts, in a sense restricted to a particular return day. It will presently be seen, from *Blackstone's Commentaries*, that it is incidental to a return, that it be to *some day* within the term.

Such is the fact. By the act of 1740, for establishing the County Courts,(*a*) it is provided, that all process in the County Courts shall be returnable to "*the next suc-* "*ceeding Court*," and shall be executed three days at least "before the day mentioned therein for the return thereof," and if any process be taken out within three days "before "the NEXT COURT DAY," it shall be returnable to the next Court, and not otherwise.

(*a*) Edit. of 1732, p. 170.

In this case, the general expression, "the next succeeding Court," in relation to the return of process, is expounded by the Legislature in the same section, to mean the "*next Court day*," or the *first* day of the next Court. It was so expounded from the general necessity of having some *particular* return day, as evinced by the whole system of our acts as aforesaid, and, in particular, in this case, because otherwise the sheriff would have no certain criterion to go by, in relation to the three days provided to intervene between the execution and *return* of the process. The *same* provision, precisely, as to the return of process made returnable to the *monthly* sessions of the County Courts by the 9th section of the County Court Law of 1792,(*a*) is interpreted by the Legislature in precisely the same manner in the same act, section 17.(*b*)

(*a*) 1 *Rev. Code*, p. 85.
(*b*) *Ib.* 86.

These two cases of a legislative construction at the same time, and in the same acts, upon a provision entirely analogous and similar to the one before us, are decisive of the point in question; especially if, as I shall endeavour to shew, the same reason exists in this case for a similar construction, and the Legislature has also shewn its sense, (though, perhaps, in expressions not quite so strong,) that the provision in question should be restricted to a particular day.

In the act in question, the process in the District Courts is made returnable to "the next Court."(*c*) There is certainly no difference between this expression and that of the "next succeeding Court," as mentioned in the County Court acts aforesaid. The exception too, in this clause, that *subpœnas* for witnesses may be made returnable to *any day* in the term, seems, by contradistinction, to import, that other process is to be returnable on *some day* of the term, and not, as is argued, to the *term generally*. As it is a general rule of construction, that an expression expounded in a particular sense in one part of an act or system of acts, shall have the same meaning, in general, in another; the foregoing legislative exposition in relation to

(*c*) 1 *Rev. Code*, 77. s. 21.

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the return days in the County Courts, would seem to settle the construction in the present case. But that is not all. By the 23d section of the District Court act,(a) it is provided, that, in suits to be commenced against a Governor, Counsellors, Judges, &c. a *summons* shall issue, instead of a *capias*, requiring the defendant to appear and answer the same "on the *proper return day* IN THE NEXT DISTRICT "COURT," and that, in the case of a copy left, *ten days* shall intervene between that service and the "*return day*." Thus we find the Legislature itself expounding in the same act the before-mentioned general expression, "the "next Court," to mean a *proper return day*, and again to mean "a return day;" and unless a return day be fixed by such construction, it is impossible for the sheriff to govern himself in relation to the ten days provided to elapse as aforesaid. In construing what day of the term is to be considered as the *proper return day*, we must undoubtedly fix on the *first* day; not only by analogy to the foregoing exposition in relation to the County Courts; not only because this day is the only one which will give the sheriff a *certain* criterion as aforesaid, but also because, in truth, this is the only day on which it is known *with certainty* that the District Court will be in session; for, although a limited number of days was provided by law for the sessions of the District Courts, the said Courts were, by the terms of the act, only to sit so long "if business required it."(b) One day, therefore, was the most that a District Court was compellable to sit under all circumstances; under the circumstances that the business of the Court did not require a longer session. Unless we adopt this construction, the consequence will be, that the service of a summons in the case just mentioned, in relation to the intervention of ten days, will be legal or illegal, not as at the actual time of the service thereof, but be rendered so by matter *ex post facto*, according as the business depending in the District Courts may require them to sit a longer or a shorter time.

(a) 1 *Rev. Code*, 77.

(b) 1 *Rev. Code*, 73. s. 1.

Again, it has been said, that the appearance day (that is, the day *after* the rising of the District Court) shall be

taken to be the return day, and that a service before that day, that is, at any time during the term, shall be sufficient.(1) Several answers occur to this idea: 1st. As this appearance day depends on the actual rising of the District Court, the same uncertainty exists in relation to *it*, as is before mentioned in respect of the last day of the term, and the same consequences ensue in relation to the ten days provided in the case of the service of certain process. 2dly. Writs are made returnable by the very words of the act, (section 21.) " to the next Court," and not to a day *after* the rising of the next Court; and, 3dly. The 23d section of the District Court Law before mentioned, not only restricts the general provision contained in the 21st section to mean a particular or " proper " return day," but also that return day is to be " *in the* " *next District Court;*" whereas the pretension I am now considering, purports to assign, as the *return day*, a day *after the expiration* of the term of the District Court.

In confirmation of this idea, that the return day of writs and process must fall *within* a term of the Courts, we are told in 2 *Bl.* 275. that the day on which the defendant is ordered to appear IN COURT, and on which the sheriff is to bring in the writ, and report how far he has obeyed it, is called the *return* of the writ, it being then returned by him to the King's Justices at *Westminster;* and that it is always returnable at the distance of at least fifteen days from the date or teste, in order that parties may have time to come up to *Westminster* from all parts of the kingdom, and " *upon some day in one of the four terms*" in which the Court sits for the despatch of business. This principle and provision of the law of *England* undoubtedly gave rise to that uniform symmetry and consistency in all our acts on this subject, (except as before excepted,) which I have already endeavoured to particularize; and comes in aid of our legislative system aforesaid, in supporting the construction I contend for.

(1) See *Tuck. Bl.* vol. 3. p. 275. note 6.

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On all these several grounds, therefore, I am of opinion, that the first day of the succeeding District Court was (in the language of the Legislature itself, in the 23d section of the same act as aforesaid) "*the proper return day*" of process issuing from the office of such Court, and therefore that the service in question was irregular and illegal.

With respect to *inconvenience:* When the General Court formerly continued for twenty-four days, the inconvenience arising from this construction might have been considerable; and therefore the Legislature provided a remedy therefor by enacting, that the *twenty-third* day of the term should *also* be a return day, before which, during the term, process might be executed: but when, by the establishment of the District Courts, the stated terms were much reduced in length under any circumstances, and also made to depend upon the actual quantity of business depending therein as aforesaid, the inconvenience was consequently much diminished; and *this*, although the second return day provided in the old General Court Law, was dropped, both in the new General Court Act, and that establishing the District Courts.

With respect to taking advantage of this irregularity, the case of *Williams* v. *Campbell*,(*a*) in an analogous case, is a direct authority in favour of the judgment of the District Court. As this irregularity appears upon the face of the return itself, taken in connexion with *the proper return day*, as resulting from the construction of the *general* law on this subject, there is no necessity to put the party to plead the matter in abatement. The *return* of the sheriff, therefore, was rightly quashed, on motion, for the reasons above assigned. It seems immaterial whether the writ should also be quashed, or not, because after the return day it no longer had any force, but had expired, and an *alias* ought to have issued. I shall not therefore say, that the District Court erred in quashing a writ, which was already quashed in effect by the law, (and therefore their judgment, as to it, was, at most, a mere act of supereroga-

(*a*) 1 *Wash.* 153.

tion.) but am of opinion, upon the whole, to affirm the judgment of the District Court.

Judge FLEMING. By the District Court Law, the Judges of the Court of Appeals were to direct the forms of writs, from time to time, and to assimilate them, as near as may be, to those then used in the General Court. By the act of 1777, establishing a General Court, all process at common law (except *subpœnas* for witnesses) were made returnable to the eighth and twenty-third days of the Court, conformably to the law and usage of the General Court, under the regal government.

By the 21st section of the District Court Law, all writs, and other legal process, (except *subpœnas* for witnesses,) shall be returnable *to the next Court* to be holden for the District, conformably to which, the Court of Appeals, in the time of Mr. *Pendleton's* presidency, formed the writs, (one of which is now before me,) and no *particular* day of the Court mentioned, for the return thereof; from whence I conclude, from analogy to cases hereafter to be noticed, that the writ might well be executed after the first day of the term to which it was returnable, provided the return was made during the sitting of the Court; and it seems analogous to the case of *Dew*, appointed Clerk of the District Court of the *Sweet Springs;* who, by the unanimous opinion of this Court, ought to have been allowed the whole term to give the security required by *law* for the due and faithful performance of his duty.(1)

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(1) Note by Judge FLEMING.

By the act of 1792, c. 66. s. 13. after directing certain oaths to be taken by every person appointed clerk, it is further enacted, that "he shall thenceforth be enabled to execute the duties of his office, which oaths may be taken by the clerks respectively, before any "Court of Record in the Commonwealth, and a certificate thereof "shall be entered of record in *his* district, wherein, *at* the first session "after his appointment, he shall moreover enter into bond, with sufficient security, &c. for the faithful performance of his duty."

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By the 26th section of the District Court Law; "In all "actions of debt, &c. the true species of action shall be "endorsed on the writ, and that appearance bail is to be "required, *the sheriff shall return on the writ the* NAME *of* "*the bail by him taken, and a copy of the bail-bond, to the* "*clerk's office, before the day of appearance.*"

Section 25. Where no bail is required, the sheriff may take the engagement of an attorney practising in the District Court endorsed on the writ, that he will appear for the defendant or defendants, and such appearance shall be entered with the clerk, in the office, on the first day *after the end of the Court* to which such process is returnable.

Section 35. *Rules* shall be held monthly in the clerk's office of each District, "beginning the day after the rising "of each Court," which is the appearance day in all suits instituted in such Court.

By the act to reduce into one the several acts concerning the County and other inferior Courts, passed in *December*, 1792, it is enacted, section 9. that all process, &c. shall be returnable to the *first* day of the next quarterly term; and in section 17. all such process shall be executed three days at least before the day therein mentioned for the return thereof.

By the County Court Law of 1748, noticed by the Judge who last delivered his opinion, pleadings and other proceedings, to carry causes to issue, were had in open Court, and not at rules held in the office; and the first business done (after hearing motions) was uniformly proceedings on what was called the *appearance docket*, or a roll of new causes, when appearances were entered, imparlances taken, &c. which continued to be the practice until the act of 1785, "*for reforming the County Courts;*" and therefore the return day, though not particularly mentioned, was properly judged to be the first day of the Court.

We have already seen, that, both by the act of 1753, for establishing the General Court, under the regal government, and by our act of 1777, establishing a General

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Court, all civil process, at common law, were made returnable to the eighth and twenty-third days of those Courts respectively. And under both those laws, all such process might be executed *at any time before the return day thereof*, except in such cases wherein it is otherwise directed by law.

From analogy, then, I conceive, that as there is no specific day mentioned for the return of writs to the District Courts, which were by law to continue twelve days, unless the business before them be sooner finished; and the appearance days were to succeed the rising of such Courts, the writ now before us might well have been executed after the first day of the term to which it was returnable: it is therefore the opinion of a majority of this Court, that the judgment of the District Court be reversed, and the cause remanded to the superior County Court of *Spotsylvania*, and put in the same state as if the *rule* of the District Court to shew cause, had been discharged.

By a majority of the Court, the judgment of the District Court REVERSED.

Pollard *against* Baylor's Devisees.

J. B. being indebted to certain *British* merchants, conveyed a tract of land and sundry slaves, in trust, to secure the payment of the debt, in three equal annual instalments, with interest from the date of the deed of trust; the payments to be made in tobacco, to be delivered at, and addressed to them in *London*, on which they were to draw the usual and accustomed mercantile commission of 21 shillings sterling, for each hogshead *actually shipped;* and it was further provided, that in case of *non-shipment* of the tobacco, a further sum *equivalent to, and in lieu of, the usual mercantile commission thereon*, at the rate of 21 shillings sterling per hogshead, estimating each hogshead to be worth 10*l.* sterling, was to be added to each payment;—held, that the transaction was usurious, and the deed of trust void.

EJECTMENT by *Robert Pollard* against *John Baylor*, in the *Fredericksburg* District Court, for one messuage and a tract of land, in the County of *Caroline*.

The Jury found a special verdict, stating, that, on the 24th day of *August*, 1790, the defendant was seised in fee

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of the land in question, and on that day executed a deed of trust to *James Brown*, of the City of *Richmond*, for the purposes in the said deed mentioned, which they find *in hæc verba*. The deed recited, that *John Baylor* was indebted to *Alexander Donald* and *Robert Burton*, of the City of *London*, merchants and partners, trading under the firm of *Donald & Burton*, in the sum of 819*l.* 7*s.* 9*d.* sterling money of *Great Britain*, the payment of which, with interest thereon at the rate of five *per centum per annum*, he was desirous of assuring to them in three equal annual payments to be made in good merchantable crop tobacco, to be delivered at, and addressed to them in *London*, upon which they were to draw the usual and accustomed commission of 21*s.* sterling for each hogshead. The property conveyed was 2,000 acres of land, being part of the tract whereon the said *Baylor* resided, nine young negro men and two young women by name, together with the future progeny of the said females. Each sum payable annually, was to bear interest from the date of the deed, and, in case of non-shipment of the tobacco, a farther sum equivalent to and in lieu of the usual mercantile commission thereon, at the rate of 21*s.* sterling per hogshead, estimating each hogshead to be worth 10*l.* sterling, was to be added to each payment. In case of failure of payment, *James Brown*, the trustee, on the request of the said *Donald & Burton*, or one of them, *in writing*, was to sell *so much of the said land*, or so many of the said slaves, (or the whole of each, if necessary,) *as should be needful* for raising the amount of the principal and interest remaining unpaid at the time of making such sale, after any instalment or instalments which should then have become due at the then current exchange, with a further sum adequate to the commission on the tobacco agreeable to the estimate aforesaid; such sale or sales to be for ready money, and at such place or places in the State of *Virginia* as to the said *James Brown* should seem most convenient, *four weeks previous notice thereof* being given in one or more of the *Virginia* gazettes. This deed was reacknowledged

and delivered at *Richmond* the 4th of *June*, 1791, and recorded in the General Court the 18th of the same month.

The Jury moreover found, that in consequence of the said deed, the said *James Brown* entered into and was seised of the said land, (which was the land in the declaration mentioned,) for the purposes mentioned in the deed; that, after executing the same, the defendant shipped and consigned to *Donald & Burton*, *one hundred and five hogsheads of tobacco, agreeable to the covenants in the said deed;* that *Donald & Burton* advanced other sums of money for the use of the defendant, " as exhibited in an account ren- " dered by *James Brown*, *attorney for Donald & Bur-* " *ton*," which account they found in the words and figures following, &c. (setting it out;) that a suit at law was instituted for the recovery of the balance due on the said account, and a verdict and judgment entered for 200*l.* which had since been paid; that, " on the 22d of *April*, 1795, the " said *James Brown* sold the lands and negroes in the " said deed mentioned, (having advertised the same *on the* " 10*th of March* in the *Virginia* Gazette,) at the *Bowling* " *Green* for ready money, when *Robert Pollard*, the lessor " of the plaintiff, became the purchaser of all the lands and " slaves in the said deed of trust contained for the sum of " 985*l.* which he then and there paid to the said *James* " *Brown*," who thereupon conveyed the said land to him by a deed in these words, &c. (setting out the deed,) dated *July* 16th, 1795, and recorded in the General Court, *November* 12th, 1796.

The account exhibited was acknowledged by *John Baylor*, in writing, dated " *New-Market*, *January* 29th, 1795, " to be just; balance due eight hundred and twenty-four " pounds 19*s.* sterling, on the 19th *September*, 1794."

On this verdict, the District Court gave judgment for the defendant, whereupon the lessor of the plaintiff appealed, and the suit, having afterwards abated by the death of *Baylor*, was revived against his devisees.

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Call, Wickham, and *Randolph*, for the appellant.

The *Attorney General*, for the appellees.

For the appellant, it was argued, that *Baylor's* contract with *Brown*, as trustee for *Donald & Burton*, was not usurious; being a transaction entirely in the way of trade, and the same in principle with the cases of *Floyer* v. *Edwards*,(a) *Winch, qui tam*, v. *Fenn*,(b) *Hammett* v. *Sir Wm. Yed*,(c) and *Tate* v. *Wellings*;(d) that the commission of 21*s.* per hogshead, allowed *Donald & Burton*, was but a reasonable compensation for their trouble in selling the tobacco which was to be consigned them; and, although they were to receive 21*s.* for every 10*l.* in case *Baylor* failed to send them the tobacco, it was in his own power to avoid paying this penalty by shipping the tobacco punctually; which circumstance prevented the contract from being usurious;(e) that the *Court* could not infer usury from the facts stated in the verdict, since the *Jury* had not *expressly* found it, nor that the contract was entered into from any corrupt motive, or for the purpose of eluding the statute; all which were questions proper for the *Jury* to consider;(f) that this was a mixed contract, consisting of two distinct parts—a loan or forbearance of money, and a sale of tobacco; that, by the contract, *Donald & Burton* were bound to place themselves in the situation of commission merchants; the stipulation, on their part, being that they would sell the tobacco, and, on *Baylor's* part, that he would send it; and both agreeing that the commission of 21*s.* for each 10*l.* should be the measure of damages, which they should recover for his failing to send it; that the advancement of their credit, as commission merchants, by consignments of tobacco, was an object of more consequence to them than the mere commission for selling; and this consideration entitled them to damages for the disappointment; as, in the case of an employer contracting to have a house built, and to furnish materials, if

(a) *Cowp.* 112.
(b) 2 *Term Rep.* 52. *note.*
(c) 1 *Bos. & Pull.* 144.
(d) 3 *Term Rep.* 531.
(e) *Roberts* v. *Tremain, Cro. Jac.* 208.
(f) 1 *Bos. & Pull.* 151.

he fails, there is no doubt but the undertaker is entitled to damages.

For the appellees, it was said, that, if the counsel for the appellant were correct in their position, that the question reserved in the special verdict could not be considered by the Court, unless the Jury had found expressly the *quo animo* with which the contract was made, the door of discussion was at once closed; and the cause ought to be sent back for a farther finding. But the Jury have expressly referred to the Court the question of law arising upon the facts; for, if they had found *usury expressly*, there could have been no question, and judgment must, of course, have been rendered for the defendant. The argument goes to the extent that there can be no *special* verdicts in cases turning upon questions of usury. It is true, the question, "*usury, or not,*" is proper for the consideration of a Jury, and they may decide it, if they think proper; but if they do not, but choose to refer it to the *Court*, the Court will decide it upon the facts, as in all other cases of special verdicts.

That this was a clear case of usury, is evident; not the case of a *merchant* about to establish commercial intercourse, but of a *planter*, who, indebted to *Donald & Burton*, under the pressure of circumstances yielded to their demands. In consideration of a forbearance of three years, he was bound to ship them tobacco, and to allow them the enormous commission of 21*s.* per hogshead; and, even if he did not ship, he was to pay the same commission, estimating each hogshead at 10*l.* sterling! It is not *found*, that 21*s.* per hogshead was the reasonable and usual commission. But, if reasonable when tobacco is actually shipped, it surely cannot be said to be reasonable, or usual, when tobacco is not shipped. There never could have been a *custom* so unreasonable. A *commission* is a compensation for *doing something*. The allowance, therefore, where no tobacco was shipped, and they were at no trouble, could not operate as a *commission*, but must have been

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intended as a *premium for the use of money*. That this additional *premium* was stated *by the way of commission* makes no difference. A man shall not shelter himself under the pretext of commercial dealing, so as to evade the statute. It was impossible for the Legislature to describe every case which constitutes usury; but they have gone as far as the ingenuity of man can to prevent it; so that, if, in any case, the *intention* appear to be to get more than legal interest, it is usury.(*a*) All the cases go to this; that, if the party attempts to disguise the transaction, in any manner, so as, in effect, to obtain more than legal interest, it will be as much usury as if a certain rate of interest above the legal, had been taken.(*b*)

(*a*) 7 *Bac. Abr.* tit. USURY, let. C. (*Gwil.* edit.) p. 191. *Jestons* v. *Brooke*, *Cowp.* 793. *Le Blanc et al.* v. *Harrison*, *Holt's Rep.* 706. *Morse* v. *Wilson*, 4 *Term Rep.* 353.

(*b*) *Lowe and others* v. *Waller*, *Doug.* 736. *Barker* v. *Vansommer*, 1 *Br. Ch. Rep.* 151.

In all the cases cited on the other side as depending on the usage of trade, the usage was expressly proved and found by the Jury, and was fair and reasonable in itself. The premium taken was conformable to the usage, and no more than a just compensation for risk and trouble. In 3 *Term Rep.* 531. *Tate* v. *Wellings*, the contract, it is true, was decided not to be usurious: but this turned on the circumstance of its being for *stock*, which is fluctuating in value; and, as the party was bound to return stock, it was reasonable that the other should receive as much money as would command as much stock with the dividends. Besides, the party had his election to pay stock, or money.

In 7 *Bac.* 198. (*Gwil.* edit.) and 1 *Atk.* 350. it is said, that, where both principal and interest are at hazard, it is not usury. But, in the present case, there was no hazard of principal or interest; both being secured by the deed of trust.

The only plausible ground on which gentlemen insist is, that the penalty might have been avoided by shipping the tobacco: but, either way, *Baylor* was to pay an enormous interest.

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Thursday, October 19th, 1809. The Judges pronounced their opinions.

Judge TUCKER. The special verdict in this case differs in some particulars from that upon which the Court decided the 20th of *October*, 1808.(1)

In this case, the Jury find, that *John Baylor* executed a deed of trust to *James Brown*, to secure the payment of 819*l.* 7*s.* 9*d.* sterling, due to *Donald & Burton*, merchants in *London*, in three equal annual instalments, by the shipment of tobacco to their address, on which they were to be allowed a commission of one guinea per hogshead; "and, in case of non-shipment of the tobacco, a further "sum in each payment, equivalent to and in lieu of the "usual mercantile commission thereon, at the rate of one "guinea per hogshead, and estimating each hogshead to "be worth 10*l.* sterling: then *James Brown*, on the re-"quest of *Donald & Burton*, was to sell, &c. the lands in "the ejectment mentioned.

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(1) The opinion of the Court, pronounced on the 20th of *October*, 1808, in another ejectment, between the same parties, and founded on the same deed, was, "that the judgment was erroneous in this, that "the Jury have not found whether, at the time of the execution of the "indenture of the 24th of *August*, 1790, by *John Baylor* to *James* "*Brown*, the latter was the agent or attorney of *Donald & Burton*, and "*as such*, received the said indenture from *Baylor*; and also in this, "that they have not found whether the 105 hogsheads of tobacco, "stated to have been shipped by the said *John Baylor* to *Donald & "Burton*, were by the former shipped to the latter in pursuance and "fulfilment of the covenants in the deed of trust in the said verdict set "forth, or to meet his bills drawn on *Donald & Burton*, at the time "of such shipments; and further, in this, that they have not found "whether the publication of the time and place of the sale of the land "and slaves in the said deed mentioned was duly made, agreeably to "the terms stated in the deed; but have found *evidence only*."

The judgment was therefore reversed, (by the unanimous opinion of the Court, consisting of Judges FLEMING, ROANE, and TUCKER,) and a new trial directed.

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"They find that, after executing the said deed, *Baylor* "did ship and consign to the said *Donald & Burton* 105 "*hogsheads of tobacco, agreeably to the covenants in the be-* "*fore-mentioned deed.*

"They find that *Donald & Burton* advanced *other* sums "of money for the use of *Baylor*, as exhibited by an ac- "count which they find *in hæc verba;* and that the deed "of trust in the said account mentioned, is the same as "the one before set forth." But they do not find, nor does the deed of trust mention, that the same was to stand as a security for any future advances which *Donald & Burton* should make to *Baylor.*

They also find, that a suit was instituted for the recovery of the *balance due on the last-mentioned account*, and a verdict and judgment entered for 200*l.*, *which has since been paid.*

They then find the sale of the lands by *Brown*, (after advertising the sale thereof once,) and the purchase thereof by *Pollard*, and a deed of bargain and sale for the same from *Brown* to *Pollard*, which, after reciting the deed of trust from *Baylor* to *Brown*, proceeds thus: "And whereas "the said *John Baylor failed altogether* in shipping to the "said *Donald & Burton any part of the tobacco* in the said "deed mentioned, and also *neglected to pay* to the said "*Donald & Burton*, or any other person for them, *any* "*part of the debt mentioned in the said deed*, to be due "from him to them, *or the interest thereon*, and the sum "of money in lieu of commissions, *so that* the WHOLE "AMOUNT *thereof* became due and payable by the said "*John Baylor* to the said *Donald & Burton*, after the 24th "day of *August*, 1793, (when the three years during "which the payments were to have been made expired,) "and the said *Donald & Burton* did afterwards request "the said *James Brown* in writing, to sell, &c. in conse- "quence of which, &c. the lands were exposed to sale, "&c. and *Pollard* became the purchaser," &c.

The District Court upon this special verdict gave judgment for the defendant. And I am of opinion, that judgment was correct. For the Jury have expressly found the shipment of tobacco, which, according to the valuation in the deed, (made for a different purpose, I admit,) must have amounted to much more than the debt and interest; thereby expressly negativing and contradicting the statement of facts contained in the recital of the deed to *Pollard;* and they have moreover found, that the balance actually due (though not that which was claimed) on the account exhibited by *Donald & Burton*, hath been actually paid. Upon this state of facts, I am of opinion, that enough appears upon *this* verdict, for the Court to give judgment in favour of the defendant, and that the same be affirmed.

With respect to the question, whether this contract be usurious, I learn from a note in the hand-writing of the late Judge *Pendleton*, which is, accidentally, in my possession at present, that in a former suit between the same parties, grounded upon this very contract, it was determined by this Court to be usury by the nature of the contract appearing in the instrument *itself.* I was previously of the same opinion, in which I am the more confirmed by that decision.

Let it be supposed, that after entering into this contract, Mr. *Baylor* had purchased bills on *London* to the amount of his whole debt and interest, and had there tendered the money to *Donald & Burton:* might they not still have insisted that he should pay them eighty guineas more in lieu of the commission of one guinea per hogshead, at the rate of 10*l.* sterling per hogshead, which he was to allow them by this contract? Or suppose that fifty hogsheads of tobacco had sold for as much as the whole debt would amount to. Must he not still have paid the commission of a guinea per hogshead, according to these stipulations, on thirty hogsheads more than paid his debt? Here, then, is a condition arising out of this contract for *further forbearance*, that the debtor should *in any event* be liable to pay eighty guineas (amounting to about ten *per cent.*)

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more than his original debt and interest. This, I conceive, brings the case fully within the statute. For *Baylor* could not, by any means whatever, discharge himself from the obligation to pay this additional premium over and above his debt and interest.

Judge ROANE. This is the third case which has come before this Court between the present parties, and grounded upon the same deed, viz. the deed of 24th *August*, 1790.

As to the first case, I do not recollect whether the account current, which is contained in the present special verdict, was also to be found in it, nor do I remember the *particulars* of that verdict: but the Court went fully into the question of usury suggested to arise upon the construction of that deed, and were equally divided upon that question. I was one of those who thought the deed not usurious, in which opinion Judge *Lyons* concurred. As that opinion has never been published, and perhaps never may be in any particular report of the case, I will beg leave to read it as a part of my opinion on the point of usury in the present case. It was delivered on due deliberation, and I have since seen no cause to change the result therein contained.

[Here Judge ROANE read the opinion now alluded to, which see in the note below.(1)]

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(1) Opinion of Judge ROANE, in the case of *Pollard* v. *Baylor*.

"With respect to the first objection made by the appellee's counsel, "there is nothing in it. The appellant's attorney did not exhibit the "deed in question as a mere immaterial paper; but, as he tells us in "his exceptions, to support his declaration. But, after that paper "was rejected by the Court, it would have been improper to have "gone on and shewn how his title was derived under it.

"Nor have I any difficulty upon the question of usury. The agree- "ment was to pay a sterling debt, with interest, by instalments, in to- "bacco, to be consigned to the creditor, who was to have the accus- "*tomed* commissions for selling. It was further agreed, that in case "of failure of payment in that mode, the principal, with interest, and

In addition to the reasons contained in this opinion, I will beg leave to say, with Judge *Lyons*, in his opinion delivered in the same case, "that in questions of usury the

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"the amount of the commissions, should be paid here, by means of a "sale of the property conveyed. If the covenant had been performed "by the appellee as contemplated, it was clearly unobjectionable. So "in the event, which has happened, I think the commissions must ei- "ther be considered as a penalty from which the appellee might have "delivered himself, and therefore the contract was not usurious, or "as a stipulated rate of damages, previously agreed upon by the "parties, for an injury produced by non-compliance.

"I will view the case, first, as before a failure, and on the face of "the deed itself; and, secondly, as under the event which has hap- "pened.

"As to the first view, it is rightly held by Judge *Buller*, in *Tate* v. "*Willings*, 3 *Term Rep.* 539. that the question is, whether a contract "was usurious or not, as *at the time* it was entered into; for, if the "contract was legal at that time, no subsequent event can make it "usurious. The same doctrine is held by Lord *Mansfield*, in the case "of *Floyer* v. *Edwards*, *Cowp.* 115. It is also held in the last case by "the same Judge, (and I adopt these positions, because I think them "right,) that usury is an agreement to pay, *originally*, the principal, "with greater interest than five *per cent.* In the case before us, con- "sidered as at the time of the contract, the commissions could not be "considered as an addition to the legal interest, but as a compensation "for a service contracted and intended to be performed; and, conse- "quently, as no greater interest than the law allows is reserved, the "contract is not usurious.

"This position, that a contract is to be adjudged as at the time of "its date, without reference to posterior events, in fact shuts up this "question. But I will notwithstanding consider it in the other aspect.

"In the event which has happened, the appellee is compelled to pay "a sum over and above the principal and interest, *i. e.* the amount of "the commissions contemplated. It is true, that, in no event, could "the appellee have avoided the payment thereof; but in the event con- "templated by the contract, viz. that of his shipping the tobacco, he "could have converted them into a *compensation* for a service actually "performed, and, consequently, that sum would have ceased to be "without consideration. It would have ceased to be an augmentation "of the interest, if otherwise it could be so considered.

"In this view, the case comes clearly within a well established rule, "that, although a penalty be reserved, yet if the borrower had it in "his power to comply, and avoid the penalty at a certain day, the con-

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"intent is more to be regarded than the words; that *Donald & Burton* were commission-merchants in *London*, "and desirous of extending their trade by procuring consignments of tobacco, the profits of which trade, in addition to that of securing the debt due to them, were

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"tract is not usurious. To constitute usury, the borrower must be "bound, in all events, to pay a greater interest than the law allows; "but in this case he was not so bound, but might, by complying with "his contract, have turned this penalty, as it is now called, into a compensation for a service actually performed.

"If it be said, that, by the contract, the consignees are not bound to "sell the tobacco, and therefore the commissions are without a consideration; the answer is, that in that event, it is, as it were, a sale to "themselves; and that the service is the same to the consignor, whether retained (as if sold) by themselves, or sold to others.

"The case of *Tate* v. *Willinge* is very applicable to our case. There "a greater interest than 5 *per cent.* was reserved on the sum lent; "but, because the borrower might have delivered himself therefrom "within a limited time, by paying stock, the contract was held not to "be usurious.

"The case of *Morse* v. *Wilson*, cited by Mr. *Call*, does not apply. "For there, in addition to the legal interest, profits of a trade were "granted, from which the borrower could not have delivered himself, "and which therefore formed an addition to the legal interest.

"In every view of the case, then, the contract is not usurious. If "the contract had been performed, the commissions would have been "given for a *bona fide* and valuable consideration. As it was not performed, the penalty arises, not from the contract itself, but from the "breach thereof by the appellee; and because he did not deliver himself therefrom by performing his agreement.

"It was well observed, that here are no *extrinsic* circumstances to "vary the construction arising from the face of the contract. If there "were, a different conclusion might follow. If, for example, it had "been agreed collaterally, that the tobacco should not be shipped, "or other circumstances existed shewing plainly, that it was well understood by the parties, that the tobacco could not or would not be "shipped. These, or such like circumstances, might induce the Court "to consider the contract as really a shift to evade the statute.

"But the contract is a mere naked one, and, on its face, I clearly "hold it to be not usurious.

"I am, therefore, of opinion, that the judgment of the District Court "ought to be reversed, and a new trial awarded, with directions to "admit the deed in question as evidence to the Jury."

"their object; and that it was a lawful object, being in the "course of their business."

Such was the opinion of a moiety of the Court, in the first case of *Pollard* v. *Baylor*. As for the note mentioned by the Judge who preceded me, and *said to contain* the opinion of Judge PENDLETON on this point of usury, it is true that the judgment of the District Court thereupon was affirmed; but it was only by the equal suffrages of the Judges of this Court. No man has a greater veneration for the memory of that great Judge than myself: but his opinion in a case in which he did not sit, which he had not heard argued, and did not take the trouble to study, ought not to be quoted as an authority. It is even less than an *extrajudicial* and *obiter* opinion.

In the next case between the same parties, this Court reversed a judgment in favour of the defendant, on account of certain *defects in the special verdict*. In reversing that judgment on that ground, and thus keeping alive the controversy between the parties, the majority of the Court undoubtedly adjudged and admitted the deed of *24th August*, 1790, not to be usurious: for else, *cui bono*, send back the parties to make their case more complete? why not at once put an end to the controversy? why continue a tedious litigation between the parties, if the Court thought that, upon the foundation of that controversy, the party claiming can never be entitled to recover? As to this point, the decision of the Court, a few days ago, in the case of *Murdock and others* v. *Herndon's Executors*, is a satisfactory authority. In this second case of *Pollard* v. *Baylor*, this question of usury was argued at length by the bar: when, therefore, the Court *sustained* the cause, and took measures to have a more perfect verdict rendered, did it not virtually at least, overrule an objection which strikes at the very foundation of the claim? did it not, in effect, decide, that the deed of *August*, 1790, was not usurious?

Taking it, then, both upon the merits of the question as aforesaid, and upon the decision in the second case just mentioned, which, otherwise, ought not to have called for

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a more perfect verdict, that the foundation of this claim is not objectionable, it remains to inquire, whether the special verdict now before us is adequate or not to sustain a judgment for the appellant under the standard set up by this Court in relation to the verdict contained in the second case, just mentioned.

On a minute comparison of the present verdict with that contained in the former case, I think the present verdict *at least* as imperfect as the former one. I will endeavour to state the particulars.

The verdict in the former case was condemned, and the judgment reversed, on three grounds: 1st. That it was not found whether, *at the time* of the execution of the deed of 24th *August*, 1790, *James Brown* was the agent of *Donald & Burton*, and, as such, received the indenture from *Baylor*. This objection equally applies to the present verdict. There is nothing more on this point found in this case than in the former. It is true it is found, that the account current stated in the verdict was *rendered* by *James Brown*, *attorney for Donald & Burton:* but this merely relates to the time of *its presentation*, viz. *January*, 1795, and that *Brown* was then attorney for *Donald & Burton;* it does not establish the fact of his agency as at the time of the execution of the deed. 2dly. Another objection to that verdict was, that it was not found whether the publication of the time and place of sale was *duly* made, agreeably to the terms stated in the deed, but that the Jury found *evidence* only; (*i. e.* the advertisement itself;) but that finding is stronger than the present in this particular; for, in that case, it was found that *James Brown* did DULY advertise the sale of the land, which word "*duly*" would seem to extend also to the number of times of publication required by the deed, whereas in the present case it is only found that the sale was made, *James Brown* "*having advertised* the same *on the* 10*th of March* in the *Virginia* Gazette:" It is neither found that it was DULY advertised as in the former case, nor more particularly, that it was advertised four weeks, according to the

requisitions of the deed. These two objections to the former verdict apply, therefore, with equal force, at least, to the one before us. A third objection made to the former verdict was, that it was not found that the 105 hogsheads of tobacco were shipped "in pursuance and "fulfilment of the covenants in the deed of trust," or "*to* "*meet bills drawn on Donald & Burton at the time of such* "*shipments.*" This objection does not apply to the case before us, for it is found in this verdict, that the defendant "did ship and consign to *Donald & Burton* 105 hogsheads "of tobacco, *agreeable to the covenants in the said deed.*"

But, in lieu of this last objection, another presents itself which did not exist in the former case. It is not found in this case, as it was in the former, that *James Brown* was requested IN WRITING, by *Donald & Burton*, to sell the premises in question, as required by the terms of the deed. This requisite is essential to the legality of a sale, and ought to be found; for the defendant did not mean to subject his land to be advertised and sold at the pleasure of the *agent*, but only of the *principals*, in whose liberality and honour he may have had more confidence.

There is, perhaps, still another defect in the present finding, which also existed in the former case, but was not noticed in the judgment of the Court. By the terms of the deed, the agent was not to sell the whole trust property to pay a *small* sum, but only "*as much as should be* "*needful*," for raising the amount of the principal and interest of any instalment which should remain unpaid, with a further sum adequate to the commission stipulated on the sales; *i. e.* 21*s.* per hogshead. To this sum, thus compounded, the opinion of the Court in the former case seems to have ADDED, as I think ought to be added, all moneys due "*for bills drawn on Donald & Burton, at the* "*time of the shipments of the tobacco.*" Now, although I have no doubt but that ALL the bills stated in the account current in truth fall within the above description, yet this is not found by the verdict, nor stated in the account itself, except in relation to the *first* bill for 165*l.* drawn *Sept.* 22,

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1790. By a *rough* calculation which I have made, the balance of principal and interest of the original sum secured by the deed *left due* by the proceeds of the tobacco shipped, added to the commission on 105 hogsheads of tobacco, according to the terms of the deed as aforesaid, and to this advance of 165*l.* will fall short of the sum actually raised by the sale of the land and negroes by the sum of 382*l.* or thereabouts; and therefore it would seem by the verdict before us, that *more* of the land and negroes were sold than was *justified* by the terms of the deed. But (as before said) having no doubt but that *all* the bills mentioned in the account were for advances made at the time of the respective payments; and, if so, as they ought, according to the opinion of the Court before mentioned, to make part of the sum for which the trust property was liable to be sold; I should think that this fact should be left open to be supplied in the verdict in future, and thus the sale actually made of the trust property stand justified as to the *whole* sum raised thereby.

The result of my opinion is, that the foundation of this claim being free from objection on the ground of usury or any other objection, both upon my own deliberate opinion on the point, and by the judgment of the Court in the former case, (which, otherwise, ought to have affirmed the judgment for the defendant on the merits,) that still the verdict before us should be set aside, and a *venire de novo* awarded; first, on the ground of the two (and perhaps three) objections common to this case with the former, as I have endeavoured to point them out; and, on this additional ground, that it is not found in the present verdict, that *James Brown*, the agent, was required *in writing* to make the sale in question, without which, under the provisions of the deed, it ought not to have been made.

Judge Fleming. When this extraordinary contract was under the consideration of this Court on a former occasion in another suit between the same parties, I was clearly of opinion that the contract was usurious, and gave my rea-

seems pretty much at large; and to that opinion I beg leave to refer.(1) Since the last able and ingenious argument of

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(1) The following was Judge FLEMING's opinion, alluded to above.

"Three questions seem presented in this case;

"1st. Whether the contract between *John Baylor* and *James Brown* "is usurious?

"2d. Whether *Brown* was the agent of *Donald & Burton* at the time "of the contract? and,

"3d. Were not 105 hogsheads of tobacco shipped by *Baylor*, and "consigned to *Donald & Burton, agreeably to the contract?* and ought "not the whole proceeds to have been applied in discharge of the debt "then due?

"1. With respect to the first point, it appears, that *Baylor*, being "largely indebted to *Donald & Burton*, (who had immediate right to "recover their debt by legal process,) and being thus in their power, "and at their mercy, was induced, in consideration of their forbear- "ance for one, two, and three years, to enter into the ruinous contract "before us, thus becoming a loan which is altogether in favour of the "creditors, without any equality or reciprocity between the parties, "and having usury stamped upon the very face of it. *Baylor* had only this "alternative, either to discharge the debt of the shipment of tobacco, "(for which he was to have credit for just as much as they might please "to allow him,) after deducting a commission of 21 shillings sterling "per hogshead, (let it be sold for what it might,) or submit to have "the trust estate sold for ready money, and pay (over and above all "expenses incident thereunto) a commission of 21 shillings sterling "for every 10 pounds on the amount of the sales.

"The first alternative was clearly against the debtor and in favour of "the creditors, because the less they gave him for his tobacco, the higher "commission they secured on the collection of their debts, and the more "freight on their shipping. By the contract the debt was to have been "paid at three annual instalments of 273*l.* 2*s.* 7*d.* each, with interest at "5 *per cent. per annum* on each instalment from the date of the deed; "to be paid by shipments of tobacco to the creditors, estimated at and "understood by the contracting parties to be worth 10*l.* sterling per "hogshead, and held out as a lure to *Baylor*. The first instalment, with "the interest, amounted to 286*l.* 15*s.* 8*d.* 2*qrs.* which 29 hogsheads of "tobacco would have overpaid 3*l.* 4*s.* 3*d.* 2*qrs.*, the commission on "which would have been 30*l.* 9*s.* The second instalment, with interest, "amounted to 300*l.* 8*s.* 10*d.* which 30 hogsheads of tobacco would "have discharged, save 8*s.* 10*d.* The third and last instalment would

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the case, I have reconsidered it, with very great attention, and the more I reflect upon it, the more am I convinced of

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" have been 314*l.* 1*s.* 11*d.* 2*qrs.*, which 32 hogsheads of tobacco would " have overpaid 6*l.* 19*s.* 0*d.* 2*qrs.* the commission on which would have " been 33*l.* 12*s.* The whole commission, then, would have amounted to " 95*l.* 11*s.* and the debt overpaid 9*l.* 14*s.* 6*d.* by the shipment of 91 hogs- " heads of tobacco.

" It appears by the verdict, that, long before the expiration of three " years from the date of the contract, *Baylor* shipped an consigned to " the said *Donald & Burton* 105 hogsheads of tobacco, ' agreeably to " ' covenants in the afore mentioned deed,' and the amount of the " sales thereof was not applied in discharge of the contract, but a new " account raised between them, and instead of 10*l.* per hogshead, as " estimated by the parties at the time of the contract, accounts of sales " of the 105 hogsheads of tobacco are rendered by *Donald & Burton*, " through their agent *James Brown*, at the average price of 6*l.* 16*s* 11*d.* " per hogshead, so that, instead of the debt and interest being dis- " charged by the shipment of 91 hogsheads of tobacco, and a commis- " sion to the creditors of 95*l.* 11*s.*, it would require 131 hogsheads of " tobacco to discharge the debt, and the debtor pay a commission of " 137*l.* 11*s.* besides the loss of 3*l.* 3*s.* 1*d.* per hogshead, on 105 hogs- " heads of tobacco, already shipped *agreeably* to contract. As to the " other alternative, the sale of the trust estate, and the very extraordi- " nary commission on the amount of sales, Mr. *Randolph*, in his argu- " ment, contended, that it was no hardship on *Baylor*, because ' that " ' extra commission must be considered as a penalty which he might " ' have avoided by the shipment of tobacco.'

" We have already seen that he had shipped 105 hogsheads of to- " bacco, agreeably to the covenants in the contract, for which, instead " of 10*l.* as estimated by the contracting parties, they give him credit " for 6*l.* 16*s.* 11*d.* and the greater part of the proceeds applied to other " purposes. But had the whole been applied in discharge of the original " debt of 819*l.* 7*s.* 9*d.* and *Baylor* had continued to ship tobacco till the " whole was paid, with interest, he would have sustained a loss of " 42*l.* for extra commissions, and of 3*l.* 3*s.* 1*d.* per hogshead on 131 " hogsheads of tobacco, amounting in the whole to 455*l.* 3*s.* 11*d.* and " thus much in discharging a debt, which, with interest from the date " of the contract, amounted only to 901*l* 6*s.* 6*d.* The loss on the sale " of the trust estate, unrighteously made, cannot with precision be " ascertained; but it must have been enormous, as two thousand acres " of land, near the Bowling Green, in the County of *Caroline*, and ele- " ven prime young negroes, with the increase of two families for about

the correctness of my former opinion, that it has usury stamped upon the very face of it; and no shift, covin, device, or deceit, appears in order to evade the statute, (and such, I am authorized to say, was the opinion of Mr. *Pendleton*, a late venerable and enlightened President of this Court,) and it appearing as well on the face of the deed itself, as by the verdict, that *James Brown*, a principal party to the deed, was the agent of *Donald & Burton*, the contract was void *ab initio;* and without considering any other point in the cause, I am of opinion, that the judgment of the District Court is correct, and ought to be affirmed.

By a majority of the Court, the judgment of the District Court AFFIRMED.

" five years, sold only for 985*l*. These calculations are made to shew " the unreasonableness and injustice of the contract, which dire neces- " sity compelled *Baylor* to submit to. It is true, that the party in whose " favour the contract so manifestly appears to be, has used no 'shift, " 'covin, *device*, or deceit, (except holding out the idea that 10*l*. ster- " 'ling per hogshead' was to be received for the tobacco, in order to " receive more than legal interest for the forbearance or giving day of " payment of the money in order to evade the statute, but has come " boldly forth in defiance of the law, and stamped *usury* on the face of " the contract, which renders it utterly void *ab initio*. From this view " of the case, then, it appears to me, 1st. That the contract being " usurious, was void in itself; 2d. That by the original deed of 1790, " exhibited by the appellant, and under which he claims, it appears " clearly to my mind, that *James Brown* was the agent of *Donald & Burton*, but, had there been any doubt on the subject, he is found by " the verdict to have been their attorney; and, 3dly. That the whole " proceeds of the 105 hogsheads of tobacco ought to have been applied " in discharge of the original debt, supposing the contract to have been " a legal one."

Wednesday, October 18, 1809.

Quarrier *against* Carter's Representatives.

1. What are the proper grounds for a bill of review. * * See 2 *Hen. & Munf.* p. 591. *note* to the case of *Ellzey* v. *Lane's Executrix.*

2. It is not necessary to state, in a decree in Chancery, that all the preliminary steps towards maturing the cause for hearing were taken; it being intended, where the cause is *set for hearing*, that it was regularly done, unless the party attempting to impugn the decree shew the contrary.

THIS was an appeal from an order of the late Chancellor of the *Richmond* District, (Mr. *Wythe*,) rejecting the application of the appellant for a bill of review. The ground on which the applicant rested his claim to a bill of review, in the Court of Chancery, was, that the cause had been taken up and decided in the absence of his counsel, and that he had been consequently surprised in the hearing. Another point was added by the counsel, *in this Court*, viz. "that the decree which the bill of review sought to "reverse was erroneous, because the original cause was "not set for hearing according to the act of Assembly."

The *Attorney General* and *Call*, for the appellant, contended, that, although the last point was not stated in the bill of review, as presented to the Chancellor, yet it was not too late for this Court to notice it. Where it appears from the whole of the proceedings, that there are sufficient grounds for a bill of review, it ought to be allowed, though *some* of the grounds may not be explicitly stated: and they likened it to the case of a *supersedeas*, where the Court will inspect the *whole record*, and reverse the judgment, if there be error, although the particular error on which the opinion of the Court is founded, may not have been stated in the petition for the *supersedeas*.

Williams, *contra*, said, that it was essential to a bill of review, that it state the former bill, and the proceedings thereon; the decree and the *particular point* in which the party exhibiting the bill conceives himself aggrieved by that decree; and the ground of law, or new matter discovered upon which he seeks to impeach it. He cited *Mitf. Plead.* 80. and 4 *Vin.* 414. pl. 5.

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Judge ROANE. A preliminary question arises in this cause, from the additional point stated by the appellant's counsel, namely, "that the decree sought to be reversed "by the bill of review was erroneous, because the case "was not set for a hearing, according to the act of As- "sembly."

This question again subdivides itself into two points of view; viz. 1. Whether this alleged irregularity is, under any circumstances, a ground for a bill of review; and, 2. If so, whether in this case it can be set up as such ground, under the particular frame of the bill which has been rejected, in the case before us.

As to the first point of view, it is clear, that a bill of review lies only for new matter discovered since the decree, or for errors apparent on the face of the decree.

When a bill of review is brought for error apparent on the face of the decree, the constant method is, (in *England*,) for the defendant to put in a plea *of the decree*, and a demurrer against opening the enrolment.(*a*) On this plea, of the decree, (and it only,) and demurrer, the Court judges whether there are any grounds for opening the enrolment; and the overruling the demurrer is *there* considered as giving leave to file the bill.(*b*) Our practice, in this particular, is variant; as stated by a note of the *Reporters* in 2 *Hen. & Munf.* 591. *Ellzey* v. *Lane's Executrix*, to which I beg leave to refer. That variation, however, does not change the *principle*, as deducible from the *English* cases. In *England*, the plea is of the *decree* itself, (and of it only, not of extraneous matters in relation to the progress of the cause,) accompanied by a demurrer objecting to opening the enrolment, on the ground that there is no error in the *decree* thus pleaded. This brings us to inquire, whether the matter now objected, in this additional point, is *properly to be considered as a part of the decree*, or ought regularly to have been made a part thereof; or, in other words, whether the decree is erroneous in not having stated on its-face, that all the requi-

(*a*) 2 *Atk.* 534. *Gould* v. *Tancred.*

(*b*) *Ib.*

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sitions of the law for maturing a cause for trial, had been complied with.

In 1 *Harrison's Ch. Prac.* 108. (old edit.) it is said, that, in drawing the decree, it is not held to be sufficient to recite therein the bill and answer, and then add that, upon reading the proofs, and *hearing what was alleged on either side*, it was decreed so and so; but that the *facts* which were *proved and allowed by the Court to be proved*, must be particularly mentioned in the decree. It is nowhere said, however, that it is necessary, or proper, to insert in a decree, that all the previous and preliminary measures necessary to prepare a cause for hearing had been complied with, and therefore the omission of these in the decree would be no objection thereto. In the same book, p. 110. the *form* of a decree is given us, in which the substance of the *proofs* is stated in the decree, together with that of the *bill* and *answer*; but no other matters of the character last mentioned are stated therein.

If, then, circumstances of this last description form, *properly*, no part of the *decree* of the Court, even in *England*, where the decrees are drawn very particularly and minutely by the register; and a bill of review of the kind we are now considering is confined to matters of error apparent on the face of the decree itself; an omission similar to that now alleged is no ground for a bill of review; for such circumstances neither *do* appear in practice, nor ought they properly to appear on the face of the decree itself.

We are told, in 1 *Harr. Ch. Prac.* 290. that a bill of review is in nature of a writ of error at common law. In a writ of error it is held, that a man shall never assign that for error which he might have pleaded in *abatement*, for it shall be accounted his folly to have neglected the proper time of taking this exception.(*a*) Again, it is said, that, if there be an omission of any writ or process, &c. yet, if judgment be not given thereupon, but the party appears and pleads to issue, and judgment is given on the verdict, this is not erroneous, because he had not taken advantage of this before pleading to issue.(*b*)

(*a*) 2 *Bac.* 492. *Gwil.* edit.

(*b*) *Ib.*

In the case before us, it is proved, on the contrary, by Mr. *M'Craw*, that the cause was *set for hearing*, which we are to intend was regularly done, by consent or otherwise, as the appellant has not shewn the contrary; especially since the first answer of the *only acting executor* was sworn to near five years before the decree was pronounced, and therefore there was sufficient time for that purpose. The analogy from these cases in relation to writs of error, shews, that, whatever remedy the party may have had in proper time, (or may now have,) for the *alleged* irregularity in carrying the cause to trial, such irregularity is not a proper ground for a bill of review.

This view of the case supersedes the necessity of considering the second question; namely, whether this particular ground of exception, if material, ought to have been distinctly assigned and pointed out in the bill of review; as to which I give no opinion, especially as the Court is so thin at present. My opinion, therefore, on this preliminary question is, that the additional point made by the appellant's counsel is not competent to warrant the bill of review, nor can be relied on in support thereof. With respect to the absence of counsel being a just ground for a bill of review, to say nothing of the frauds which would be produced thereby, this ground is interdicted by the criterion I have already mentioned, namely, that bills of review must be either for *new* matter recently discovered, or errors apparent on the face of the decree. That criterion explodes the pretension in question, as a ground for a bill of review.

Judge TUCKER concurred.

By the Court, (Judge FLEMING not sitting in the cause,) the order of the Chancellor disallowing a bill of review, was AFFIRMED.

Thursday, October 19, 1809.

Darmsdatt *against* Wolfe.

The superior Courts of Chancery have power (upon general principles of equity) to direct the *venue* to be changed *after issue joined* in a County or other inferior Court, where it appears that strong prejudices existed against the defendant, which were unknown to him until after such issue was joined, and that a fair and impartial trial could not be expected in the Court where the suit was depending.

In such case, it is not necessary that there should have been a *judgment*, to authorize the Chancellor to grant the injunction.

JOSEPH DARMSDATT instituted an action of trespass assault and battery against *Benjamin Wolfe*, in the Hustings Court of the City of *Richmond*. The *capias* was returned executed to *August* term, 1801; and a writ of inquiry awarded to the ensuing *November* term, when the plea of not guilty was put in by the defendant, issue joined, and the cause continued at his costs. On the 6th of *March* following, *Wolfe* obtained an injunction from the Superior Court of Chancery to restrain the Court of Hustings from proceeding to the trial of the said issue, and, by consent of parties, such trial was directed to be had in the District Court to be holden at *Richmond* in the next month, but no citizen of *Richmond* to be of the Jury. This injunction was granted on bill, answer, and sundry affidavits, taken with notice, disclosing circumstances, from which it appeared highly probable, that an impartial trial could not be had without changing the venue. It appeared also, that some of the most important of those circumstances did not occur until after the issue was joined.

The District Court refused to try the issue, or even to suffer it to be placed on its docket, being of opinion that the Chancellor had no authority to make such order. After this, the Court of Hustings, on the motion of *Darmsdatt's* counsel, in spite of strenuous opposition on the part of the defendant, determined to proceed with the trial, and ordered a Jury to be impanelled; whereupon the counsel for the defendant withdrew his appearance, as such, and a verdict was found, and judgment rendered, for the plaintiff, for one hundred dollars damages and costs.

A second injunction was then awarded by the Court of Chancery, and a motion to dissolve it overruled; "the "Court being of opinion, that it hath power to direct the "issue in an action for an injury which is not a felony, "depending before any Court within the limits of its ju-

"risdiction, (where this Court believeth the trial will not "be impartial,) to be tried before another Court of com- "petent authority within the same jurisdiction."

At a subsequent District Court, holden at *Richmond*, the 10th of *September*, 1803, the Judges complying with the Chancellor's order, the issue was again tried, and a verdict for eighty-eight dollars damages and costs, certified to the Court of Chancery, which thereupon decreed, that the injunction to stay proceedings on the judgment of the Hustings Court be perpetual; that *Wolfe* pay the damages and costs recovered by the aforesaid certified verdict; and that *Darmsdatt* pay the costs of both the suits in Chancery.

On petition of the latter to the Judges of this Court, an appeal was allowed him.

Copland, for the appellant, relied on a clause, relative to writs of *certiorari*, in the County Court Law;(*a*) from which he inferred that the Court of Chancery had no authority, *after issue joined*, to direct the removal of a cause from a County or Corporation Court, to be tried before any other tribunal. He contended also, that, in no case, could the Chancellor grant an injunction to stay proceedings in a *suit depending*, but only on *judgments*; and quoted the 50th, 54th, and 55th sections of the act reducing into one the several acts concerning the High Court of Chancery.(*b*)

(*a*) *Rev. Code*, vol 1 c. 67. s. 67. p. 92.

(*b*) *Ib.* c. 64. p. 67, 68.

Hay, *contra*, said, that, notwithstanding a Court of *Common Law* could not award a *certiorari* after issue joined, a Court of *Equity* might (upon general principles) direct a *change of venue*. The existence of such a power is essentially necessary, for the purpose of preventing a failure of justice, and incident to the nature and constitution of a Court of *Equity*. The sections referred to, relative to injunctions to stay proceedings on *judgments*, did not abridge the general powers of the Court. They merely subjected the jurisdiction, in the cases therein mentioned,

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to certain regulations, but did not take it away in other cases not enumerated.

The power of the Court of Chancery to award injunctions has been repeatedly exercised both before and since the revolution, and exists independently of the statute. It may be exercised in a variety of cases, even where there is no suit; for example, to stay *waste*.(1)

Tuesday, November 14. The Judges (ROANE and FLEMING, Judge TUCKER not sitting in the cause) pronounced their opinions.

Judge ROANE. *Darmsdatt* brought an action of assault and battery against *Wolfe*, in the Court of Hustings of the City of *Richmond*. The writ was returnable to the *August* term, 1801; issue was joined at the *November* term; and the appellee with great difficulty avoided being forced into a trial at that Court: at length, however, he got his cause continued.

The unusual rapidity of this movement, while, perhaps, it did not afford the appellee time to gain a knowledge of the prejudices existing in the City against him, prior to the cause being put to issue, comes in aid of one of the allegations of his bill, that even the bench of justice itself was not free from prejudice against him. The cause being thus at issue, and no mean left the appellee (to my knowledge) to remove the cause to another Court, or to change the *venue* by application to a Court of Law, he applied to the Court of Chancery for that purpose. He charged in his bill, and proved by testimony, that a torrent of prejudice existed against him in the City; that unusual pains had been taken to foster and encourage it; that strong prejudices existed against him, even on the part of some of the Justices themselves, as manifested at the *November*

(1) See *Harris* v. *Thomas*, 1 *Hen. & Munf.* 17. and *Scott* v. *Wharton*, 2 *Hen. & Munf.* 25.

term, *after* the cause had been put to issue, and in particular, from an unusual "anxiety" being discovered in them to force him into a trial at that term; and that both from this temper in the Court, and from the prejudices existing among the people of the City, he could not have a fair trial, in the Court in which the cause was depending. As much of this ground of complaint (if not all of it) had only come to the knowledge of the appellee *after* the cause was put to issue, he would have been entirely without remedy, in respect of a change of *venue*, but for the interposition of a Court of Equity.

Nothing is more clear than that the powers of a Court of Equity are competent to this purpose, when the powers of the law tribunals are inadequate; on the ground of that jurisdiction being assistant to the jurisdiction of Courts of Law;(*a*) and on the further ground that the interposition of a Court of Equity is *necessary* under such circumstances, to ensure a "fair, impartial and satisfactory trial."(*b*) It was particularly necessary that this interposition should be exercised, in default of the powers of the Courts of Law as aforesaid, especially "in small jurisdictions," where "a cry has "been raised, and the passions of the multitude inflamed," or "where one of the parties is popular and the other a stran-"ger, or obnoxious."(*c*) The case thus put by the author of the *Commentaries*, is the very case at bar, as proved by the testimony, (to which I beg leave to have very particular reference,) with this imperious circumstance to justify the interference of the Court of Equity in the present case, that the material facts, or some of them, rendering a change of the tribunal necessary to an impartial trial, only came to the knowledge of the appellee *after* the hands of the Courts of Law were tied up from granting relief in this particular, by the stage at which the proceedings in the cause had arrived. But for the interposition of the Court of Equity, the appellee would have been immolated on the altar of prejudice, and the trial would neither have been fair nor satisfactory.

(*a*) 1 *Fonb.* 10.

(*b*) 3 *Bl.* 383.

(*c*) *Ibid.*

Nothing in any of our statutes, respecting the grant of injunctions or *certioraris* by the Courts of Chancery, has any

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relation to the case now under consideration. The power exercised by the Court of Chancery in this case is one of the main pillars of its jurisdiction, and is indispensable to the pure and fair administration of justice.

The Chancellor was therefore justified, not only by his undoubted jurisdiction in this case, but also by the facts proved in the cause, in arresting the proceedings in the Court of *Hustings*, and causing a trial to be had before a more impartial tribunal. He went too far, indeed, in extending his interference to the *indictment* also; (which being a *criminal* proceeding, is beyond the cognisance of the Courts of Equity;)(*a*) but that proceeding is at an end, and is not now before us. When, therefore, he changed the *venue* by directing the trial to be had in the *Richmond* District Court, providing also, by consent of parties, that no citizen of *Richmond* should be upon the Jury, he was strictly within his province, as he (in default of adequate power in the Courts of Law) thereby placed the cause in a channel to ensure a fair and impartial trial. The refusal of the District Court to try the issue, agreeably to the mandate of the Court of Chancery, cannot be justified on any ground more favourable to such Court than that of its entire ignorance of the just powers of the Courts of Equity in this particular; and as the particular ground of the proceeding in the Court of Chancery was entirely unknown to the District Court, (for, I presume only the order directing the trial of the issue was before it,) this refusal went the full length of affirming that this power could not rightfully be exercised by the Court of Chancery, *under any circumstances whatsoever!* not even under the strong and *possible* circumstances of the whole bench of the Court of *Hustings* having declared, *after* issue was joined, and when, consequently, no possibility was left for the appellee to remove the cause except by application to the Court of Chancery, that the appellee should not receive justice at its hands!!

(*a*) 1 *Fonb.* 5.

With the highest respect for all the tribunals of our country, it is my duty, sitting in this place, to remark upon this unexampled procedure, as equally unwarranted by the laws

of our country, and tending to sap the very foundations of justice: and, admitting that the order of the Court of Chancery was not justifiable so far as it related to the *indictment*, *this* formed no apology for the District Court for not proceeding to try the civil issue.

The Court of *Hustings*, emboldened by the example of the District Court, improved upon the contumacious conduct of the latter: for, while the latter only refused to execute an order of the Court of Chancery, the former made a positive inroad upon it: it proceeded to try the issue which was both interdicted, as to that tribunal, by the order of the Court of Chancery, and translated to the *forum* of the District Court; and all this with a full knowledge of the existence of that order! The Court of *Hustings*, therefore, thus not only outraged all precedents on this subject, but also verified, perhaps, the allegation of the appellee, of its unfriendly disposition towards him: and, as his counsel actually withdrew from his defence, from a proper respect for the order of the Court of Chancery, which the Court and the adverse counsel were at that moment actually violating, and thus left the appellee wholly undefended; on this ground, also, the verdict in the *Hustings* Court ought not to bind him.

In this whole business the conduct of the appellee has been free from blame. While he submits to the damages and costs recovered against him in the District Court at the *subsequent* term, it is right that he should recover the costs of both suits in Chancery. Those suits were imposed upon him in the first instance by the necessity of resorting to the Court of Chancery to ensure to him a fair trial, and afterwards by the errors or contumacy of the District Court and Court of *Hustings*. Admitting, therefore, that the *appellant* was himself *personally* free from blame also, *his* is but the common case of being compellable to pay costs in consequence of the errors or mistakes of the inferior tribunals. The appellant has less reason to complain, in this respect, than the appellee had in the case of *Cocke* v. *Pollock & Co.*,(a) who was condemned to pay the costs of an appeal to this

(a) 1 *Hen. & Munf.* 449.

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Court imposed upon him with the sole view of settling a general question of jurisdiction.

On these grounds I am of opinion to AFFIRM the Decree now before us.

Judge FLEMING. The administration of justice (says Judge *Blackstone*, in his *Commentaries*, volume 3. page 383.) should not only be chaste, but should not even be suspected: and though in some respects, juries coming from the neighbourhood are advantageous, they are often liable to great objections: and after noticing some instances, he adds "*or* "*where a cry has been raised, and the passions of the multi-* "*tude have been inflamed, or where one of the parties is popu-* "*lar, and the other a stranger, or obnoxious, &c.* the Courts "of *Law* will therefore, in transitory actions, very often "change the *venue*, or county where the case is to be tried."

The very case now before us. There is abundant proof, from the affidavits of *Moody*, *Harris*, and *Quarrier*, that the cry was loud, and that strong prejudices prevailed against the appellee; who, it seems, was not apprized of those circumstances, until after there was an *issue* in the cause, which was joined in a short time after its commencement; and it was then too late to apply to a superior Court of *Law* to remove the cause by a *certiorari:* his only mode of relief was by an application to a Court of *Equity;* which in my conception had ample jurisdiction to afford him a remedy. We are told by Judge *Blackstone*, that, in *England*, though the Courts of Law have no *direct* power to change the *venue* in *local* actions they sometimes do it *indirectly* and by mutual consent; yet to effect it directly and absolutely, the parties are driven to a Court of Equity; where, upon making out a proper case, it is done, upon the ground of being necessary to a *fair*, *impartial*, and *satisfactory trial*. And it is laid down, as a *general principle*, in *Fonblanque*, page 9. that equity stands for the *whole of natural justice;* is more excellent than any human institution; and that Courts of Equity are assistant to the jurisdiction of Courts of *Law*, by removing legal impediments

to the fair decision of a question depending in a Court of *Law*. If, *in England*, then, a Court of Equity has the power of changing the *venue* in cases where the Courts of Law have no such *direct* power, upon the same principle may Courts of Equity exercise the same powers *here*, unless restrained by an express statute: and it appears to me that there could not have been a more proper occasion for exercising the power, than the one now under consideration. I therefore, without minutely stating the circumstances of the case, which have been amply investigated by Judge ROANE, who preceded me, concur in opinion that both decrees be AFFIRMED.

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Atwell's Administrators *against* Milton.

THIS was an appeal from a judgment of the District Court of *Hay Market*, reversing a judgment of the County Court of *Prince William*.

Milton brought an action of covenant against the administrators of *Thomas Atwell*, stating, in substance, that a certain *Johnson Smith*, and the said *Thomas Atwell*, by their certain *writing obligatory* sealed with their seals, and dated the first day of August, 1783, in consideration of 85*l.* sold and delivered to the plaintiff a certain negro boy; and for themselves, their executors, &c. thereby covenanted with the plaintiff to indemnify him, &c. from all claims whatever for said negro: and then avers that the boy was afterwards recovered of him in an action of *detinue*; by means whereof

1. An administration account settled before commissioners appointed by the Court in which the executor or administrator qualified, and certified "to have been returned to Court, and being examined, to have been allowed, and ordered to be recorded," is admissible on the plea of *fully administered*, as *prima facie* evidence of the several items therein, without producing also copies of the inventory and appraisement of the testator's or intestate's estate. But the adverse party may surcharge and falsify such account, if he can.

2. In an action against the representatives of a person deceased, on a joint covenant entered into before the act "concerning partitions and joint rights and obligations," (1 *Rev. Code*, 31.) if it appear from the declaration that one of the joint covenantors survived, it is a radical defect, and not cured by verdict.

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an action accrued to the plaintiff to demand of the said *Johnson Smith* and *Thomas Atwell* in his life-time, damages, &c. "by means whereof, and by force of the act of Assembly in that case made and provided, this action accrued "to the plaintiff, after the death of the said *Thomas*, to demand and have of the defendants, his damages, &c. "and assigns for breach that neither *Johnson Smith* and "*Thomas Atwell*, in the life-time of said *Thomas*, *and the "said Smith since the death of the said Thomas*," although often required, have performed their said covenants, but have altogether broken the same, &c.

The defendants pleaded, 1st. *Covenants performed;* 2dly. That their testator, and themselves, since his death, were always ready to defend the claims of the plaintiff according to the covenant; 3dly, and 4thly. Two other immaterial pleas; and, 5thly. *Fully administered.* To all which pleas the plaintiff replied generally.

On the trial of the cause, the defendants offered in evidence, to support the issue of *fully administered*, an account of their administration as settled by commissioners appointed by the Court of *Prince William* County, which was certified "to have been returned to the Court, and being ex-"amined, to have been *allowed*, and ordered to be record-"ed;" which was the only evidence exhibited by them. Whereupon the counsel for the plaintiff prayed the opinion of the Court, whether the said account was *legal evidence* of a full administration, and sufficient to support the said issue, without further proof. The County Court gave it as their opinion, that the said order of Court and account were evidence fit to be sent to the Jury, *no proof of mal-administration having been offered.* To which opinion the plaintiff excepted. There was a verdict and *judgment for the defendants* in the County Court; which was afterwards *reversed* in the District Court; that Court being of opinion that the account, settled by commissioners, ought not to go in evidence without copies of the inventory and appraisement of the intestate's estate. The administrators brought the cause before this Court.

Botts, for the appellants, made several points; but those on which he most relied, and on which the cause turned, were, 1. That the appellee, by his own shewing in the declaration, that *Johnson* survived the intestate of the appellants, had exhibited a survivorship of all the covenants upon *him*, (*Johnson*,) thereby discharging the estate of *Atwell* from further liability.

2. That the opinion of the County Court, in deciding that the account of administration was admissible evidence, as it was offered, was clearly correct, and agreeable to the universal undertanding of the country. Such account is not only *prima facie* evidence, but is the best evidence the nature of the case will admit of, without burthening the estate and exhausting the assets in establishing items by distant witnesses, where assets in fact remain; and where they do not, by compelling executors and administrators to throw away their own estate to prove that they had not defrauded others.

Judge TUCKER, after stating the case, proceeded: In the case of *Carr's Executors* v. *Anderson*,(a) the paper offered in evidence as an inventory and appraisement of *Barbara Carr's* estate, did *not* appear to have been signed by the executor, nor submitted to the Court and *ordered to be recorded*. It was therefore the unanimous opinion of this Court, that it was not proper to be admitted as evidence. In the case of *Anderson and Starke* v. *Fox and others*,(b) I was of opinion that an executor's account appearing to have been submitted to, and settled by commissioners appointed by the Court in which the will was proved, ought to be taken as *prima facie* evidence of the several charges and credits therein contained; but that any person interested therein might be at liberty to *surcharge* and *falsify* the same, if capable of producing satisfactory evidence to that purpose. For the reasons which then occurred to me in support of that opinion, I beg leave to refer to the book, and to the authorities there cited, viz. 2 *Ves.* 566. *Pitt* v. *Cholmondely*, and 2 *Bro. Ch. Ca.* 62. *Brownel* v. *Brownel*. I will beg leave to add a further reason in support of that

(a) 2 *Hen. & Munf.* 361.

(b) *Ibid.* 245

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opinion. By our law both executors and administrators are bound in an obligation to make a true and perfect inventory of their testator's or intestate's estates, and to exhibit the same, *when required*, to the Court; and to administer the same according to law; *and make a just and true account of their actings and doings therein*, &c. The executor may certainly, *without being required*, exhibit his accounts to the Court for settlement, because, being bound by obligation in a heavy penalty, to do so when required, he ought to be permitted to do so without being required. The Court are to proceed to have the accounts duly examined and settled. To this end the *inventory* and *appraisement* (where the latter is required) must be considered as *preliminary* requisites and *necessary vouchers*. And when the Court has referred them to commissioners to examine, state, and settle, who report (as in the present case) that they have *examined the account and vouchers* to them submitted and closed the account, which is afterwards certified to have been *examined* and *allowed* by the Court and ordered to be recorded; can there be a doubt that a copy of the account so *exhibited*, *examined*, *allowed*, and admitted to record by the proper tribunal, would *prima facie* be so far conclusive evidence, in favour of the executor, in an action brought upon his official bond, as to shift the burden of proof, as to any thing which might surcharge or falsify such account, from the executor to the plaintiff, according to the authorities last referred to? I conceive not, and therefore think the judgment of the County Court correct, and that of the District Court erroneous.

There are two other grounds on which I think this judgment erroneous. First, this was a *joint* covenant entered into before the act concerning joint rights and obligations, and it appears by the declaration that *Johnson Smith*, one of the covenantors, survived *Atwell*, against whose administrators the suit was brought, which brings the case within that of *Lyell* v. *Elliot*,(a) and of *Johnson* v. *Richardson*,(b) and *Harrison* v. *Field*.(c) But even if *Atwell* had been alive, and the suit brought against him alone, instead of his

(a) MS. Rep.
(b) 2 Call, 527.
(c) 2 Wash. 136.

administrators, the obligation being joint, and *Johnson Smith* appearing to be still alive, the omitting to sue him, as well as the other, would have been error, according to the decision of this Court in *Leftwich* v. *Berkeley*,(a) and several other cases decided on the same grounds. I therefore think that the judgment of the District Court should be reversed, and that of the County Court affirmed.

(a) 1 *Hen.* & *Munf.* 61.

Judge ROANE. As the declaration in this case is radically defective in not setting out a sufficient cause of action, I should be for sustaining the judgment for the appellants, even if the County Court had erred in givin gthe instruction to the Jury, which is excepted to. The declaration is radically defective in this, that being upon a joint covenant, it ought to have stated the survivorship of the appellants' intestate: but, on the contrary, it *rather* states, or admits, the survivorship of *Smith*, the other covenantor; and, if so, the action was for ever gone against the representatives of *Atwell*.

With respect to the instruction given to the Jury, the settlement before the commissioners of *Prince William* Court, was *prima facie* evidence of a full administration. Before those commissioners the inventory was produced by the appellants. This is not *expressly* stated in the account rendered; but, being the natural course of business, it will be intended: it is therefore unnecessary for an executor, after the inventory has been exhibited before the commissioners, to produce it again on the trial. On the other hand, the inventory and appraisement may be given in evidence AGAINST an executor, or BY him where no settlement has been made before commissioners, or, in his discretion, even where such settlement has been made, but the executor objects to be bound by the appraised value of the estate. In the present case, however, it would have been an act of supererogation in the executor to have done it, as the estate was found indebted to him; and I am of opinion, on both grounds, that the judgment of the District

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Court should be reversed, and that of the County Court affirmed.

Judge FLEMING. Two questions seem to be presented in this case; 1st. Whether an action of covenant could lie against the administrators of *Atwell*, during the life of *Smith*, the other joint covenantor? and, 2dly. Whether the account of the administration of *Thomas Atwell's* estate, made before commissioners under an order of *Prince William* Court, and there examined, allowed, and admitted to record, was not *proper* evidence on the issue of *plene administravit*?

With respect to the first point, it seems to me very doubtful whether the action could be maintained; and I am inclined to think that it could not; but, as the other point seems clearly in favour of the appellants, I have not given it a mature consideration.

As to the other point, the administration account, duly examined and admitted to record, is, *prima facie*, good evidence; and the reason given by the District Court, why it ought not to have been admitted, is the want of copies of the inventory and appraisement of the estate of the intestate to support it. The inventories and appraisements are, by law, required to be made and returned to Court, there to remain for the inspection of creditors, and others, who may be affected by, or interested in, them; but it is not customary, nor is it necessary, that they should be exhibited with the accounts returned to Court and admitted to record, when they are offered in evidence, which ought to be *conclusive*, unless there be some errors or error pointed out by the adverse party, and particularly excepted to: And, that not having been done in the case before us, where a large balance appears in favour of the administrators, the account was properly admitted to go as evidence to the Jury on the issue of *plene administravit*; and I, therefore, concur in the opinion, that the judgment of the District Court be reversed, and that of the County Court affirmed.

Tazewell's Executor *against* Barrett & Co.

Thursday, October 26, 1809.

THIS was an action of debt in the District Court of *Williamsburg* by *John Barrett & Co.* assignees of *Emanuel Walker & Co.* who were assignees of *Theodorick Bland*, against *Henry Tazewell*, on a bond in the penalty of eighteen hundred pounds, dated *March* 13, 1785, conditioned to be discharged by the payment of nine hundred pounds on or before *December* 25th, 1786, assigned to *Emanuel Walker & Co. May* 10, 1786; and by *Emanuel Walker* to the plaintiffs on the 10th of *March*, 1787. The defendant (without filing any plea) brought into Court the principal and interest upon the bond, from the 20th of *March*, 1793, and moved the Court to have the suit dismissed at his costs, praying to be discharged from the interest which accrued on the said bond between the day when it was payable and the said 20th of *March*, 1793; on the ground that an attachment in Chancery on behalf of the executors of a certain *Theodorick Bland* (a creditor of the above-mentioned *Theodorick Bland*) was depending in the County Court of *York*, against him the said *Tazewell* as a garnishee, and restrained him during that time from paying the principal. The plaintiffs, claiming the said interest, refused to accept the money so brought in: but the Court was of opinion that the sum brought into Court ought to be received by the plaintiffs without any interest, pending the suit in Chancery in *York* Court, and directed the suit to be dismissed at the costs of the defendant; to which opinion the plaintiffs filed a bill of exceptions *stating the case imperfectly*. This judgment was therefore reversed by the Court of Appeals on the 21st of *April*, 1798, and the cause remanded for farther proceedings.(*a*)

The defendant having afterwards died, the suit was revived against his executor; and at a Court held for the

(*a*) See 1 *Call*, 223. *Barrett & Co.* v. *Tazewell.*

1. After a *bona fide* assignment of a bond, and notice thereof to the obligor, he cannot be restrained by an attachment in Chancery at the suit of a creditor of the *obligee* from paying the debt to the *assignee* notwithstanding the *subpœna*, with the usual endorsement by the Clerk, was served upon him *before* he received such notice, and *afterwards* (but before he answered the bill) the Court made an order restraining him "from paying *the debt which he owed the defendant.*"

2. Therefore, in this case, the obligor, (though previously served with the subpœna,) having received notice of the assignment shortly after the bond became payable, and failing for nearly six years to answer the bill, (which was filed before the notice was given,) was not allowed (in a suit against him by the assignee) any deduction of interest between the day when the bond became payable, and that when the restraining order was set aside.

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District aforesaid, in *September*, 1802, the defendant moved to withdraw the motion made by his testator, and now to plead payment; which the Court permitted him to do, upon his agreeing that the money paid into Court might be paid over to the plaintiffs, and, "this payment being "made since the institution of this suit," that he should pay the costs of this suit. The defendant excepted to this opinion of the Court, but, nevertheless, pleaded "payment "by his testator," on which plea issue was joined.

The Jury found a special verdict, stating, (in addition to the circumstances already mentioned,) that interest on the bond had not been paid from the 25th day of *December*, 1786, to the 19th of *March*, 1793; but that all the residue of the said bond had been paid; that the process to stay the effects of *Theodorick Bland* in the hands of the defendant's testator, was issued on the 19th, and executed on the 24th of *May*, 1786; that the bill in Chancery was filed in *September*, 1786; that an order was made by the Court of *York* County in *May*, 1787, making *John Barrett & Co.* (the present plaintiffs) parties in the said suit in Chancery, and restraining the defendant's testator from paying away the debt due from him to *Theodorick Bland*, which debt so restrained was the same debt now claimed by the plaintiffs; that *John Barrett & Co.* filed *his* answer in said suit in 1789, claiming this debt as due to them by assignment as above; and, in *August* in the same year, "it was withdrawn," and the suit *as to him* dismissed; that an attachment issued in *March*, 1787, to compel the defendant's testator to answer the bill; that he filed his answer in *September*, 1792, and on the 19th of *March*, 1793, the said restraining order of *York* Court as to him was set aside; that in *January*, 1787, the defendant's testator had notice that the bond was assigned to *Emanuel Walker & Co.* on the 10th of *May*, 1786; and that, whether the restraining order of *York* Court be considered as operating upon the debt due by the bond in question, or not, yet the opinion of both *John Barrett & Co.* and *Henry Tazewell* was, that they *were* thereby restrained. The conclusion of the verdict was as follows; "and if, upon

"the whole matter, the Court shall be of opinion, that the "plaintiffs are entitled to the interest during the period last "aforesaid, we find for the plaintiffs the debt in the declaration mentioned, to be discharged by the payment of the "interest during the period last aforesaid, to wit, from the "25th of *December*, 1786, to the 19th of *March*, 1793; but if "the Court shall not be of that opinion, we find for the defendant."

On this verdict the Court gave judgment for the plaintiffs; whereupon the defendant appealed.

Wickham, for the appellant, observed, that the bond in this case contained *no stipulation* for payment of interest; that interest, therefore, could accrue only on the default of *Tazewell* to pay the principal; and the bond having been *assigned* before it became due, there could be no *default* until it was presented to him by the assignee, and payment *demanded*. The creditor having thrown the bond into circulation, the debtor was not bound to *seek* the person of the assignee. So, if the creditor goes without the limits of the Commonwealth, interest is not recoverable.(*a*) *Bland* the obligee, had left the country, and the debt was attached in *Tazewell's* hands before the bond was payable, by the endorsement of the Clerk on the *subpœna* in Chancery; which endorsement was effectual for that purpose, as was decided in the case of *M'Kim* v. *Fulton*.(*b*) During the pendency of the attachment he could not pay the money, and therefore should not be liable for interest.

(*a*) *M'Call* v. *Turner*, 1 *Call*, 133.

(*b*) *MS.*

The notice in *January*, 1787, of the assignment was not sufficient. The assignee, to entitle himself to interest, must not only give notice, but demand payment, and, to make the demand, must seek out the debtor.

Call, *contra*. If the attachment was not *solicited* by *Tazewell*, he availed himself of it to procrastinate the payment of the debt. Immediately after the bond fell due, he had notice. It is admitted the assignee was bound to give notice; but that was done.

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Why did not *Tazewell* file his answer? The attachment was served in 1786, and could not be discharged until he answered: yet his answer was not filed until 1792; and then, through compulsion, by process of contempt. In the mean time he surely made interest of the money. If a party is sued in Chancery about a sum of money, he may relieve himself by bringing it into Court, and praying the direction of the Court, as was said by this Court in *Mucon* v. *Ambler*, (*MS.*) In that case it was even an *unliquidated* demand. In *Dunlop* v. *Garnett*, and *Dunlop* v. *Jones*, in the High Court of Chancery, (in 1794,) it was decided that, if a *garnishee* fails to bring money into Court, he is compelled to pay interest.(*a*)

(*a*) 2 *P. Wms.* 27. *Maxwell* v. *Wettenhall.* *S. P.* as to interest on legacies.

M'Call v. *Turner* was a very different case from this. The ground of the decision there was, that the situation of the country rendered it impossible to make payment. But in another case the Court held, that, where one of the creditors was in this country, the debtor should pay interest.

It is objected there was *no stipulation* for interest; but this was of no consequence; the bond being with a *penalty*, which the act of Assembly says shall be discharged by the payment of the principal and interest.

It should be remarked, too, the attachment was only for 400*l.* and the bond for 900*l.*

Monday, November 13. The Judges FLEMING and ROANE (TUCKER not sitting in the cause) delivered their opinions.

Judge ROANE. Upon the authority of some decisions in this Court, and particularly that of *Hunter* v. *Spotswood*,(*b*) I incline to think that the testator of the appellant was responsible for the interest; and therefore concur with the judge who preceded me, who seems more clear upon the question than I am. In the case of *Hunter* v. *Spotswood*, this Court affirmed a decree of the Chancery, giving interest against *Herndon*, who had, as Sheriff, received mo-

(*b*) 1 *Wash.* 145.

ney produced by the sale of attached effects under an order requiring him to pay the same to *Hunter*, he giving security therefor. *Hunter* declining to do this, the money remained (and, *it was said*, had died by depreciation) in *Herndon's* hands. It is supposed that this interest was decreed on the ground that the identical money was not kept by *Herndon*, but that he had used it, and, perhaps, made a profit on it.

On the ground of the principle established by this decree, I concur that the decree of the District Court be AFFIRMED.

Judge FLEMING. The only remaining question in this case is, whether the appellant's testator has shewn good legal cause why he should have been exempt from the payment of interest on his bond from the 25th of *December*, 1786, the time it was payable, to the 20th of *March*, 1793, when he was dismissed out of *York* Court. The ground of his claim to such exemption was, that *during all that time*, his hands were tied, by the restraining order of the County Court of *York*, and he knew not to whom the money was to be paid.

In order to a correct decision, let us take a short view of the progress of the business from its origin.

The bond in question to *Theodorick Bland*, was dated the 30th of *March*, 1785, and payable the 25th of *December*, 1786. On the 10th of *May* preceding, it was assigned to *Emanuel Walker & Co.* On the 19th, process in Chancery issued from *York* Court, against *Theodorick Bland*, the obligee, and the defendant *Henry Tazewell*, on whom process was served on the 24th of the same month. In *September*, 1786, the bill was filed in *York* Court. In *January*, 1787, (if not before,) *Henry Tazewell* had notice that the bond was assigned to *Emanuel Walker & Co.* In *March* following, an attachment issued to compel him to answer; and on the 20th of the same month, *Walker & Co.* assigned the bond to *J. Barrett & Co.* On the 21st of *May* was

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made an order of *York* Court, restraining the defendant from disposing of any debts or effects of *Theodorick Bland*, and *John Barrett & Co.* made defendants to the suit; who filed their answer, which in *August* the same year was withdrawn, and the bill dismissed as to them. In *September*, 1792, *Henry Tazewell* filed his answer; five years and a half after the attachment, and in *March* following, the suit in Chancery was dismissed as to him.

In *September*, 1794, *J. Barrett & Co.* instituted a suit on the bond, in the District Court of *Williamsburg*, against *H. Tazewell*, who brought into Court 539*l.* 10*s.* 5*d.* which he tendered in discharge of his bond, claiming an exemption from the payment of interest from the 25th of *December*, 1786, till the 20th of *March*, 1793, when the suit in Chancery was dismissed, as to him. *Barrett & Co.* refused to receive the money on those terms.

Upon the assignment of the bond to *Walker & Co.* which was done previous to the issuing of process in Chancery from *York* Court, Mr. *Tazewell* immediately became their debtor, and was no longer the debtor of *Theodorick Bland*; and it is stated in the original bill of exceptions, as agreed by the parties themselves, and certified by Judge *Parker*, that he had notice of the assignment of the bond to *Walker & Co.* before it became due, but subsequent to the process of *York* Court being served on him; though it is found in the verdict, that in *January*, 1787, the defendant's testator had notice that the bond was assigned to *Emanuel Walker & Co.* on the 10th day of *May*, 1786, which does not contradict what had been previously agreed by the parties, that he had notice of the assignment before the bond became payable. But, admitting that he had no notice till a month afterwards, what ought he then to have done? He knew that the bond carried interest on the amount of the condition, from the day it became payable, and that the person or persons entitled to the principal debt, had also a right to the accruing interest; and, whilst the matter was suspended by the Chancery process of *York* Court, he ought (if he meant

to exonerate himself from the payment of interest) to have brought, and deposited the money in Court, there to abide its subsequent order, on the same principle that a defendant in debt, upon a bond with condition for the payment of a lesser sum at a certain day, who would avail himself of a plea of tender, and that he was, and always had been, ready to pay; in order to avoid damages for the detention of the debt, must also bring the money into Court. And he ought immediately, or in a reasonable time, to have answered the bill; and stated (which he might have done in a few words) the assignment of the bond to *Walker & Co.* by which it would have appeared to the Court, that he was no longer the debtor of *Bland;* he would consequently have been immediately dismissed from the suit in Chancery, and all difficulties respecting the *creditor* of the bond, would have ceased, as it was payable to the last assignees; but instead of doing what was incumbent on him, he failed to answer until, in *March* following, an attachment was awarded against him for his contempt; *and five years and a half thereafter* he filed his answer, and was soon after dismissed out of *York* Court; keeping in suspense and withholding the debt all this while from *John Barrett & Co.* to whom the bond had been assigned on the 20th of *March*, 1787, about three months after it became due. When the bond was put in suit in the year 1794, the defendant brought into Court the sum of 539*l.* 10*s.* 5*d.* which he tendered in discharge of his bond, claiming an exemption from the payment of upwards of six years' interest, on account of difficulties which arose from his own negligence and misconduct; and it is a sound maxim in law, that no man shall take advantage of his own *laches* to the prejudice of another. The case of *M'Call & Turner* was cited, and relied on by the appellant's counsel; but that case is essentially different from the present. There the obligee was beyond sea, where he remained from *April*, 1775, to *April*, 1783, and it was not known in whose possession he left the bond, or whether he took it with him; and it is well known that a debtor is not obliged to seek his cre-

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ditor in a foreign country; and it was upon that *ground* that the interest was extinguished during *M'Call's* absence beyond sea, added to the obstructions to the ordinary course of business, during the revolutionary war. I am of opinion, upon the whole, that the appellant's claim of exemption from the payment of interest, is altogether unsustainable, both in law and equity; and that the judgment ought to be affirmed.

Brooke's Administrators *against* Shelly.

Friday, October 27th, 1809.

Construction of the act of 1792, which makes it the duty of the *Court* "in an action upon an *open* account against an executor or administrator, to cause to be expunged from such account all items appearing to have been due five years before the death of the testator or intestate." (*Rev. Code*, vol. 1. p. 167. sect. 56.)

1. The above act applies to open accounts existing before the 1st day of *October*, 1793, when it took effect. (See *Rev. Code*, vol. 1. c. 150. p. 293.)

THIS was an action of *assumpsit* brought, on the 28th of *January*, 1799, by *John Shelly* against *Walter Brooke's* administrators in the County Court of *Fairfax*, for sundry articles of household furniture sold and delivered, and work done by the plaintiff for the intestate. Pleas "*non assumpsit* "by the intestate," and "*non assumpsit* by the same within "five years next before the day of issuing the original "writ;" on which pleas, issues were joined. At the trial, the plaintiff, in support of his cause, offered to the Jury an account stated, the items in which bore date in the years 1787, 1791, and 1792, "and offered to prove, that the "said account was justly due from the said *Walter Brooke*, "deceased, and that the said *Brooke*, about twelve months "before his death, that is to say, some time in the year "1797, (about two years before the commencement of the "suit,) *acknowledged that the balance now claimed was just*,

2. But the act relates only to *open accounts* and does not extend to *settlements* or *assumptions*; therefore the plaintiff, to take his case out of the act, may give in evidence an *assumpsit* of the testator or intestate, within five years, to pay a stated balance.

3. If a superior Court of common law, in reversing a judgment and awarding a new trial, assign the reason to be that certain evidence should have been received on the former trial, but fail to *direct* that, upon the new trial, such evidence shall be received, the Court of Appeals, in *affirming* its judgment, will *add* the proper direction concerning the evidence.

"and that the said *Walter Brooke* departed this life in 1798: "but the Court, upon the motion of the counsel for the de- "fendants, directed the items of the said account to be "stricken out, and refused to hear the evidence offered by "the plaintiff;" to which opinion of the Court the plaintiff excepted. Verdict and judgment for the defendants.

On an appeal to the District Court, holden at *Haymarket*, (the parties by their attorneys having agreed that the items of the account, expunged therefrom by the County Court of *Fairfax*, appeared to have been due more than five years before the death of the intestate,) this judgment was reversed, the verdict set aside and a new trial directed; the District Court, "being of opinion that the plaintiff ought to "have been permitted to prove the *assumpsit* of the intes- "tate within five years before his death:" but the judgment of the District Court did not go on to direct, as it ought, that upon the new trial, the evidence objected to should be received. From this judgment the defendants appealed to this Court.

Williams, for the appellants, admitted, that under the general act of limitations, a promise within five years will revive a debt barred; but relied on the 36th section of the act concerning wills, *Rev. Code*, vol. 1. p. 167. (which section was, for the first time, enacted at the session of 1792,) as imperative that the items shall be stricken out. The Legislature meant to impose upon creditors the necessity of closing their accounts within five years. Though the replication states that there was an *assumpsit* within five years, yet that will not vary the words of the account. The *Court* are only to look into the *account*, and see that the items are within five years; and, if not, to expunge them. It would be a nugatory thing in the Court to strike out the items of the account, and then permit the Jury to hear evidence to establish it.

No counsel appeared for the appellee.

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Monday, October 30. The Judges, TUCKER and ROANE, (FLEMING having been prevented by indisposition from sitting in the cause,) pronounced their opinions.

Judge TUCKER. The only question upon this record, is, whether the County Court ought to have admitted the evidence offered by the plaintiff to prove that Mr. *Brooke*, the defendants' intestate, within twelve months before his death assumed to pay to the plaintiff a balance of 63*l.* 15*s.* appearing to be due upon an account stated, and in which there were credits for sundry payments to the amount of 93*l.* 18*s.* made by the intestate in his life-time, or whether that evidence was properly rejected by the Court, by whom all the items of the account which appear to have been due five years before the death of the intestate were expunged therefrom, according to the act concerning wills, &c. *Rev. Code*, vol. 1. p. 167. c. 92. sect. 56.

The same question occurred in the case of *Fisher's Executor* v. *Duncan & Turnbull*,(*a*) and Judge FLEMING and myself then concurred in the opinion, that such evidence as that offered by the plaintiff ought not to have been rejected.

(*a*) 1 *Hen. & Munf.* 574. 577.

The opinion of this Court in *Beale* v. *Edmundson*,(*b*) I think strongly corroborates the other. I am therefore of opinion, that the County Court erred in *rejecting* the testimony and expunging the account, without hearing it, and that there is no error in the judgment of the District Court reversing that judgment. It may, however, be advisable to add to it a direction, that the County Court shall, on the new trial, admit the evidence formerly offered to be given, if the same shall be again offered to them.

(*b*) 3 *Call*, 514.

Judge ROANE. The principal item in the account bears date in 1787, and the act under which *all* the items of the account were expunged was not passed until the 13th of *December*, 1792.(*c*) In the case of *Fisher's Executar* v. *Duncan & Turnbull*,(*d*) I expressed it as my then opinion,

(*c*) 1 *Rev. Code*, vol. 1 p. 167. sect. 56.

(*d*) 1 *Hen. & Munf.* 575.

that that act did not apply to previously existing accounts, inasmuch as it would affect the *rights* of the parties by making it the *imperious* duty of the *Court* to bar the plaintiff by a defence which before only rested in the discretion of the *defendant*. I still rather hold this opinion: but, as this ground of objection had been *before* disregarded by the Court in the case of *Hoskins* v. *Wright*,(a) and was again apparently disregarded by the two other Judges in *Fisher's Executor* v. *Duncan & Turnbull*, I can readily yield my impressions on this point, to these decisions; and I will, therefore, consider this case as if every item in the account had arisen posterior to the passage of the act in question.

(a) 1 *Hen. & Munf.* 377.

As to the question upon the merits, I entirely concur with the opinions of the two Judges as reported in *Fisher's Executor* v. *Duncan & Turnbull*,(b) that the act of 1792 relates only to *open* accounts, and does not extend to exclude evidence of settlements or assumptions by testators within the time limited by the act. The reason and policy of this provision of the act does not require such a construction. In addition to these authorities, I beg leave to refer to the decision in the case of *Beale* v. *Edmundson*,(c) in an analogous case. The grounds of that decision seem fully to apply to this case, and to narrow the application of the act to cases depending upon the account, as exhibited, only, and do not interdict proof of settlements or assumptions of the debt within the time prescribed by the act.

(b) 1 *Hen. & Munf.* 574.

(c) 3 *Call*, 514.

As, therefore, the appellant offered to prove in the Court below, not only that the account exhibited "was justly due," but also that the intestate, about twelve months before his death, "*acknowledged that the balance claimed now by the* "*plaintiff of his administrators was just*," the County Court erred in refusing to admit such testimony to be adduced; and the judgment of the District Court, reversing the judgment of the County Court on that ground, is correct.

Friday, November 3d, 1809.

The Mayor and Commonalty of Alexandria *against* Chapman.

1. Under the act of 1796, c. 31. authorizing the Mayor and Commonalty of *Alexandria* to recover *by motion* the amount of moneys assessed *for paving the streets*, a judgment, (*in terms*) for such assessments, "*and also for the taxes of the town*," cannot be sustained; notwithstanding, from the account exhibited, it appear that such judgment was actually intended to be for no more than the sum due for such assessments.

2. The defendant having proved, in opposition to such motion, that he had personal property in *Alexandria* of greater value than the amount of assessment; *quære*, is he bound, moreover, to prove that the Serjeant of the town had knowledge of such property, and that a distress could have been levied upon it.

THE appellants, upon motion, at the *Fauquier* County Court, in *March*, 1802, recovered a judgment against the appellee for 60*l.* 17*s.* 0*d.* 1-2. "being the amount of assess-" ments imposed on the defendant's property in the town of " *Alexandria*, for paving the streets of said town, and for " the *town tax* on said property, for the years 1799, 1800, " and 1801," with costs. A bill of exceptions was filed, stating that "on the trial of this motion the defendant offered " in evidence, from the testimony of one witness, that there " was property in the town of *Alexandria*, consisting of four " slaves, three of whom were hired by the year, and one " other who was permitted to hire himself; that the said " slaves were at the time of the taxes becoming due, and " from that time to the present have been, resident in *Alex-* " *andria*, and in the power of the Serjeant of said town; " but it was not proved that it was known to the Serjeant " of *Alexandria* that the said property was there, upon which " a distress could be levied, upon the terms before stated, " three of the said negroes being under hire, and another of " them at liberty to hire himself; that the plaintiffs on their " part produced an account (inserted *in hæc verba*) with " an admission in writing by the defendant's counsel that " the same was supported by proper evidence; which was " *all* the evidence offered upon the trial, (*the notice being* " *confessed.*") The account, under a marginal date of

3. *Quære*, where a judgment is obtained by motion in a summary way, under a *private* act of Assembly, is it necessary, in stating the evidence in a bill of exceptions or case agreed, to mention that such act was read, or given in evidence, to the Court?

4. Also, *Quære*, where an act of Assembly authorizes a judgment by motion in a summary way in the Court of the County where the defendant resides, is it necessary, if no objection to the jurisdiction appear in the record, that it should have been stated therein that the defendant was actually a resident of the County, to the Court of which the motion was made?

"1798," contained charges *for paving*, amounting to 60*l*. 17*s*. 0*d*. 1-2. and under marginal dates of "1799, 1800 and 1801" charges for taxes on property amounting to 6*l*. 0*s*. 0*d*. which sum of 6*l*. 0*s*. 0*d*. was deducted from the aggregate at the foot thereof, so as to leave a balance of 60*l*. 17*s*. 0*d*. 1-2. for which the judgment was rendered.

Upon an appeal to the District Court held at *Haymarket*, this judgment was reversed, and the motion of the plaintiffs overruled; whereupon they appealed to this Court.

Williams, for the appellants.

Botts, for the appellee.

In support of the judgment of the County Court, it was argued that, if the defendant thought proper to object to the sufficiency of the evidence he should have *demurred*, instead of taking a bill of *exceptions*;(*a*) that the evidence was certainly *legal*, and the Court had a right to judge of its *weight*. But, if the County Court erred, the judgment of the District Court was also erroneous, because they should have given such judgment as the County Court ought to have rendered.

(*a*) 1 *Wash.* 362. *Wroe* v. *Washington & others.*

On the other side it was said, that a demurrer to evidence would have been strange in a case not before a *Jury*, but the *Court*, which had complete jurisdiction as to the law and the facts.

The act of 1796, c. 31. on which this motion was made, was a *private* act;(*b*) and it should have appeared on the record, that it was given in evidence by reading it to the Court.(*c*) That act, too, being in derogation of the common law, is to be construed strictly. It was sufficient, that the defendant *had property within the town of Alexandria*, to take the case out of the act: it was not necessary that the remedy, without motion, should be complete. The Legislature probably had in view this particular species of property.

(*b*) 1 *Morg. Essays*, 55. 58.

(*c*) *Rev. Code*, vol. 1. p. 112. sect. 30.

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In reply, it was urged that the rules relative to private acts of parliament in *England* do not apply in this country. *There*, private acts are not printed with the public statutes; but *here* all the acts are printed and distributed in the same way. It was therefore unnecessary to produce it, for the magistrates might have acted on it from their own knowledge.

The motion was justified by the spirit and meaning of the act; for, although the slaves were in *Alexandria*, there was no proof that the Serjeant knew they were there.

Botts also raised an objection to a variance between the judgment and notice, a copy of which appeared in the record; contending that confession of notice amounts only to an acknowledgment that the notice, as exhibited, was served on the party, not to an acknowledgment of its correctness: otherwise it would be a notice at large. But *Williams* insisted that confession of notice waived all objections, and rendered it unnecessary for the Court to look at it.

Tuesday, *November* 7. The Judges, ROANE and TUCKER, (FLEMING having been prevented by indisposition from sitting in this cause,) pronounced their opinions.

Judge TUCKER. By an act of Assembly passed in the year 1796, c. 31. the Mayor and Commonalty of the town of *Alexandria* are authorized to recover of any person holding *lands* within the limits of the said town, and who have no other property therein on which the *taxes or assessments* imposed on such property *for paving the streets* therein can be levied, the amount of *such* taxes or assessments *by motion* in the Court of the County or Corporation, where such persons reside. Under this act a motion was made in the Court of *Fauquier* County, against the appellee, *George Chapman*, "for a judgment against him for the sum of 66*l.* 17*s.* being "the amount of the assessment imposed on his property in "the town of *Alexandria, for paving the streets of the said*

" *town*, AND for the TOWN TAX on his said property for the " years 1799, 1800, and 1801, notice whereof was proved " by oath."

The Court rendered a judgment against the defendant for 60*l.* 17*s.* being the amount of assessments imposed " on the " defendant's property in the town of *Alexandria*, for *paving* " *the streets* in the said town, AND *for* the TOWN TAX *on* " *said property* for the years 1799, 1800, and 1801 with " costs." The District Court reversed the judgment and the Mayor, &c. appealed.

There can be no doubt, I think, that this judgment of the County Court was erroneous; because the act above mentioned does not authorize a judgment against a person having property in the town of *Alexandria*, and residing out of its jurisdiction, for any tax, or assessment whatsoever, except for PAVING THE STREETS. Upon this ground, therefore, I think the judgment of the District Court must be affirmed, so far as relates to the reversal of that of the County Court.

The defence set up was, that *Chapman* had four slaves in *Alexandria*, three of which were hired by the year, (not specifying to whom,) and the fourth was *permitted to hire himself*, and that those slaves, at the time of the taxes becoming due, and from that time to the present, were *resident* in the town of *Alexandria*, and in the *power* of the Serjeant of the said town; but it was *not* proved that it was *known* to him that they were there.

With respect to this point, it is generally true, that, where any person wishes to avail himself of any special act of the Legislature, in his favour, he must shew his case to be completely within the provisions of the act; but in this case, the defence set up is of such a nature as might well have been unknown to the plaintiffs, and perhaps the facts thus alleged in the defence, might have been carefully *concealed* by the defendant's own conduct, with a view to protect his negroes from being distrained for his taxes. I am inclined to think, that, under *such* circumstances, the plaintiffs ought not to be barred of this remedy, without actual *notice* of the residence

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of the negroes in *Alexandria*, being proved; or such circumstances of notoriety appearing as might create a presumption that the fact of their residence *might* have been known to the plaintiffs.

To the bill of exceptions an account stated is annexed, in which there are charges to the amount of 60*l.* 17*s.* for what I presume must be deemed *paving the streets;* which is admitted by *Chapman's* attorney to have been supported by proper vouchers. A separate charge for the *town tax* amounts to 6*l.* and that sum appears to have been deducted from the whole account which was 66*l.* 17*s.* as in the notice mentioned. Although I have little doubt that the manner of entering up the judgment, viz. for the TOWN TAX as well as the tax for *paving the streets*, was the blunder of the Clerk, since the judgment is rendered for the precise sum demanded for paving the streets, yet I presume we must take the judgment as we find it; and, in its present form, it is clearly erroneous. But I think sufficient appears from the bill of exceptions to enable us to correct it in this particular, and enter it for paving the streets only; which is all the law allows.

As to the objection that the act of Assembly ought to have been set forth as a part of the *evidence* before the Court; and that the word ALL, at the end of the bill of exceptions, excludes the presumption that the Court had it before them, I am not fond of indulging such exceptions. It might have been given in evidence, or it might have been shewn to the Court as the ground of jurisdiction. If an exception was meant to be taken on *that* ground, I think the defendant should have pleaded to the jurisdiction. He confessed the notice, without doing so, and I think he ought to be held to his implied admission.

Upon the whole, as I am clearly of opinion the judgment of the County Court, in the form in which it appears, is erroneous, and, as there is a difference of opinion on the other points, I am satisfied with affirming the judgment of the District Court, reversing that of the County Court.

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Judge ROANE. It is unnecessary to decide the question whether the Act of 1796 should of necessity have been given in evidence on the trial. Whatever my impressions may be on this point, as derived from the *English* doctrine, from the provision of our statute in relation to giving private acts in evidence, and from the practice of this country in relation to the findings in special verdicts, the question is important, and may *possibly* be influenced by some circumstances in this country not existing in *England*. I will therefore leave it entirely open, and have really no *conclusive* opinion upon it.

As for the act of 1796, it only warrants a judgment for the amount of moneys due for paving the streets, and then only when the person moved against hath no property other than real within the limits of the town of *Alexandria*, on which the amount of the assessment can be levied. Besides, a judgment under the act can only be rendered by the Court of the County where the defendant *resides*. On all these important grounds the judgment before us seems defective. For, 1st. The judgment is not only for such assessment, but also "for the taxes of the town." When I see that the *amount* of the judgment rendered is short of that stated in the notice, by exactly the amount of the items for "town "taxes" mentioned in the account exhibited at the trial, it is highly probable that those items were disallowed, and judgment in fact rendered only for the money due for paving; but, on the other hand, this *may not* have been the case; and as the judgment itself says otherwise, I do not hold myself at liberty to conclude that the judgment in this particular is unobjectionable.

As to the 2d ground, it does not appear to us that the case has happened which would authorize a procedure under the act. On the contrary, the defendant *proved* that he had other property residing within the town, and, as I understand it, of value sufficient to satisfy the sum due for paving: as to its being necessary for the defendant to give notice to the Serjeant of the existence of this last fact, the law does

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not require it, and I shall not add to or alter the law to favour this summary proceeding.

As to the 3d point, there is only one Court in the Commonwealth which is authorized to give a judgment under the Act, and that is the Court of the County in which the defendant resides. It ought to appear to us, by stating or shewing the fact of the residence, that the Court which rendered the judgment had cognisance of the case. I can presume nothing to support a summary judgment.

These ideas have resulted, as well from my own deliberate judgment in the case, as from the spirit of decisions in this Court in relation to summary proceedings. I shall not quote those decisions very particularly, but refer *generally*, (as at present recollected,) to the cases of *Asberry* and *Calloway*,(a) *Anderson* v. *Bernard*,(b) *Martin* v. *Beverley*,(c) and *Stuart* v. *Hamilton*.(d)

(a) 1 *Wash.* 72.
(b) *Ibid.* 196.
(c) *Call's MS.* Spring term, 1805
(d) 2 *Hen. & Munf.* 48.

On the whole, my opinion is to affirm the judgment of the District Court, reversing that of the County Court of *Fauquier*.

Williams moved that the judgment of affirmance should be rendered *without prejudice*. He was apprehensive the affirmance of that judgment (which was "that the "plaintiffs take nothing by their motion") would be a perpetual bar.

Judge Tucker was opposed to making any special entry. If this judgment should be pleaded in bar, a replication, shewing that the original judgment of *Fauquier* was reversed, would certainly be sufficient to prevent the bar.

Judge Roane said it was usual, in *reversing* judgments, to assign reasons, but not in *affirming*. He could see no necessity for changing the rule in this case; nor could he apprehend the consequences stated by Mr. *Williams*. This Court cannot be presumed to know any thing of the state of accounts, but to have decided upon the matters of *law*, as

the District Court did. He should regret that a construction should be put upon the judgment of this Court which would prevent the Mayor, &c. of *Alexandria*, from endeavouring to get their money by pursuing a proper course. But he could not think that would be the case. Besides, he presumed, the case would be reported, and the opinions of the Judges upon this point stated.

Syme *against* Griffin.

Wednesday, November 8, 1809.

NICHOLAS SYME assignee of *John Lacy*, Sheriff of *New Kent* County, brought in the County Court of *York* an action of debt against *Corbin Griffin*, surety for a certain *John Webb* in a prison bounds bond, dated the 12th of *December* 1786.

The declaration set forth the bond with the condition thereof at large; and then proceeded thus; "And WHEREAS "the said *John* did depart and go out of the bounds assigned by the said Justices of *New Kent*, in the County of *New* "*Kent*, contrary to the form and effect of the condition "aforesaid, *whereby the said writing obligatory became for-* "*feited;*" and "whereas afterwards the said *John Lacy*, as "Sheriff of said County of *New Kent*, by his deputy *Bene-* "*dict Crump*, did assign over and deliver to the plaintiff the "said writing obligatory by endorsing an assignment on the "same, by reason of which ASSIGNMENT, and by force of an "act of Assembly in that case made and provided, an action "hath accrued to the plaintiff to have and demand from the

1. It is settled under our act of Assembly, (1 *Rev. Code*, p. 80. ch. 66. sect. 40) that a *plea* and *demurrer*, at the same time, to the *whole* declaration, are admissible.

2. A *general* demurrer is an issuable plea, which ought to be received for the purpose of setting aside an office judgment.

3. In debt on bond with collateral condition, an assignment of a breach commencing "and *whereas*," &c. and continuing by way of *recital*, to the end, without any direct averment, is insufficient; and such error is fatal on general demurrer.

4. A bond taken by the Sheriff of a debtor in custody, conditioned that such debtor shall keep within certain prison-bounds, "*until he shall have discharged the debt and costs, and* "*save harmless the said Sheriff*," is illegal and void. It should be, simply, "that he shall "not depart or go out of the rules or bounds of the prison to which he was committed."

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"said defendant the said sum of 251*l.* 12*s.* 6*d.*; nevertheless "the said defendant, although often requested, hath not paid "the same," &c.

The condition of the bond as set forth was "that if the "above bound *John Webb* shall keep within the prison "bounds laid off by the Justices of the Court of *New Kent*, "*until he shall have discharged the debt and costs, and save* "*harmless the said John Lacy*, then the above obligation to "be void, otherwise to remain in full force and virtue."

The defendant not appearing, a conditional order was confirmed against him in the Clerk's office; which at the ensuing Quarterly Court was set aside, on his appearance and filing a *general demurrer* to the declaration, together with the plea of conditions performed. The plaintiff joined in demurrer, and replied generally to the plea. On argument, the demurrer was sustained, and judgment for the defendant; and that judgment was affirmed by the District Court, from which the plaintiff appealed to this Court.

Randolph, for the appellant.

Wirt, for the appellee.

On the part of the appellant an objection was made to a demurrer to the whole declaration and a plea to the whole: but the Court said it was settled, under our act of Assembly,(*a*) that a plea and demurrer at the same time to the whole declaration are admissible. *Randolph* also observed the demurrer was offered too late; for an office judgment could be set aside by an issuable plea only, and a demurrer which does not go to the *merits*(1) of the case is not an issuable plea.(*b*) He then admitted the decisions of this Court as to the *quod cum*, and the want of a direct averment in the declaration, but contended that those decisions applied only to actions of *trespass*. In the Court of Common Pleas the

(*a*) *Rev. Code*, vol. 1. c. 66. sect. 40. p. 80.

(*b*) 7 *Term Rep.* 530. *Berry* v. *Anderson.*

(1) The case in *Term Rep.* was one of *special*, and not of *general*, demurrer, which was the present case.

quod cum has long been disregarded; and in K. B. resort is had to a *fiction* to get over it.(a) When, therefore, this Court adopted the evil of the *quod cum*, it would have been well to have adopted the antidote with it: but, since that fiction cannot be resorted to here, they should, for that reason, have emancipated themselves from the rule. He hoped, however, they would not, by analogy, extend it to other cases. In an action on a bond the "whereas" is mere inducement, and ought not to be regarded: and here the words "*whereby the said writing obligatory became forfeited*" amounted to a positive averment.

(a) 3 *Hen. & Munf.* 230. *in note.*

On the other side, it was urged, that the reason was the same, in every case, that a *positive averment* of the *gist* of the action should be made. The breach was therefore defectively assigned, being merely by way of *recital* throughout. Besides, there was no *time* laid when the breach was alleged to have been committed; neither was it so set out as to be clearly within the terms of the condition;(b) for, notwithstanding *John Webb* did depart and go out of the prison bounds, he might have previously "*discharged the debt and* "*costs and saved harmless the said John Lacy.*"

(b) 1 *Esp. N. P.* 298. 1 *Str.* 227.

But the grand objection is, that the bond itself is void in law; the condition being different from that prescribed in the act of Assembly.(c) According to that act it should have been "that he the said *John Webb* should not depart "or go out of the rules or bounds of the prison to which he "was committed:" the words "until he should have discharged the debt and costs and saved harmless the said "*John Lacy*," should not have been added. The variance is fatal, under the general provision in the act of of 1748, c. 6. sect. 7.(d)

(c) 1748. ch. 8. sect. 21 24. *Ed. of* 1769. p. 196 *reenacted Rev. Code*, vol. 1. p. 303. c. 151. sect. 37.

(d) *Ed. of* 1769. p. 184.

To shew the jealous rigour of Courts in relation to these bonds taken by Sheriffs, see *Dalton's Sheriff*, 518—522.

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Saturday, November 18. The Judges pronounced their opinions.

Judge TUCKER. The turn which was given to the argument of this cause, on the ground of the want of a sufficient averment of the cause of action in the declaration, would almost induce a suspicion that the gentleman from whom it proceeded held the decisions of this Court in less respect than they are certainly entitled to; or that he had forgotten his own argument in a very late case on the same point; or was unacquainted with the principles upon which the decisions in *Winston* v. *Francisco*,(a) *Chichester* v. *Vass*,(b) and *Cooke* v. *Simms*,(c) (all of which were actions on the case, and after general verdict,) were founded. *Lomax* v. *Hord*, was also an action on the case; and though inclined to think the second count might be supported after a verdict, I yielded my opinion, without reluctance, to the majority of the Court who thought otherwise, although that case, also, was not upon a demurrer. That a sentence introduced by the word *whereas* has been always regarded as mere recital, unless in a subsequent part of it there is some positive allegation, has been too long settled both by pedagogues and rhetoricians, as well as by Courts, to be doubted at this day. That part of the declaration in which the ESCAPE (the very *gist* of this action) is mentioned, is prefaced in that manner; nor does it appear to me to be helped by the words "*whereby the said writing obligatory* "*became forfeited;*" that being only a *legal conclusion*, and not as was contended a *substantive averment* of a matter of fact. Still I should have struggled hard to support this declaration, if in the subsequent part a proper expression, such as might refer to the *whole* subject matter before recited had been used, instead of the word *assignment*, as the inducement to the action. For the assignment of the bond *alone* could not give a *right* of action unless a precedent *escape* had given a cause of action: neither is this mistake (probably made *currente calamo*; aided upon a demurrer, by the subsequent words "and by force of an act of

(a) 2 *Wash.* 187.
(b) 1 *Call*, 83.
(c) 2 *Call*, 59.

"Assembly in that case made and provided," because the act of Assembly does not give an *action* unless there has been an escape, which in this case is not properly averred. In an action founded upon a statute, the plaintiff ought to *aver every fact* necessary to inform the Court that his case is within the statute. Whether a verdict might have supplied the want of this averment, I shall not pretend at present to say; the question before us being, whether it is good upon a general demurrer. I think it is not.

But an objection was taken to the bond itself, which, if sound, is fatal not only to the present action, but to any other that may be brought upon this bond. By the act of 1748, c. 6. incorporated in the late revisal,(*a*) it is declared that it shall not be lawful for any sheriff or his officer or deputy, to take any obligation of or from any person or persons in his custody, for or concerning any matter relating to his office, otherwise payable, than to *himself*, as *sheriff*, and dischargeable upon the prisoner's appearance, &c. And every obligation by any sheriff taken, in *other* MANNER *or form* by colour of his office, shall be NULL *and* VOID; except, in any special case, any other obligation is, or SHALL BE by law, particularly and expressly directed. This clause was framed on the purview of *stat.* 23 *Hen.* VI. c. 10. concerning which great doubts were formerly entertained, whether the Judges must take notice of it, *ex officio*, or whether it must be pleaded,(*b*) but that doubt has been lately overruled in *England*;(*c*) and there is the same or greater reason for overruling it in this country, where special pleading is so seldom practised, and where the law permits private acts to be given in evidence without pleading. The bond authorized to be taken from persons in *execution* by the act of 1748, is to be taken to the sheriff with good and sufficient *securities* under a reasonable penalty, upon condition that he shall not depart or go out of the rules, or bounds of the prison to which he was committed. Any further *substantive condition* under the first recited act is therefore void.(*d*) The sole question then is, whether those words

(*a*) *Rev. Code*, vol. 1. c 80. s. 17. p. 122.

(*b*) See *Plowd.* 64, 65.

(*c*) 2 *Term Rep.* 574, 575. *Samuel* v. *Evans.*

(*d*) *Plowd.* 64, 68.

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of the condition, "if the above bound *John Webb* shall keep "within the prison bounds laid off by the Justices of the "Court of *New Kent*, until he shall have *discharged the debt* "*and costs*, AND *save* harmless the said *John Lacy*, then "the above obligation to be void, otherwise to remain in "full force and virtue," do import a substantive *condition* BEYOND THAT which the law authorizes. Suppose *Webb* should have taken the oath of insolvency, and had been discharged by virtue thereof. Would he not have broken the condition not to depart the bounds *until he should have* discharged *the debt* and costs? Certainly, I conceive: the bond is therefore void for that part of the condition which should have only required that he should not depart the bounds, until thence discharged by *due course of law*. Again; suppose him to have left the bounds, and that the sheriff had neglected to pursue the proper steps pointed out by the law to take him; and for that *neglect* the plaintiff had brought suit against the sheriff and recovered. Still might not the sheriff, according to the latter part of this condition, have brought suit against *Webb* and his securities, to indemnify him for his departure from the bounds, though he might have retaken him if he would, the next day, or perhaps the next hour? Certainly he might, unless the bond itself be void. Now every bond taken in such manner as to induce or encourage neglect of duty in a public officer is void, I conceive, by the *common law*.

The statute has, for the sake of the prisoner, superadded a further security against the abuses of office, by declaring all bonds taken in any *other* manner or form, than such as is by law PARTICULARLY *and expressly directed*, VOID.(*a*) I am therefore of opinion both judgments were correct, and ought to be affirmed.

(*a*) See *Dives* v. *Manningham*, *Plowd.* 60—69. See also *Rogers* v. *Reeves*, 1 *Term Rep.* 418.

Judge FLEMING.(1) After a deliberate and mature consideration of this case, I perfectly concur in the opinion just

(1) Judge ROANE (being related to the plaintiff) did not sit in this cause.

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delivered, on every point; and more especially, that the bond on which the action was founded is illegal and void, not being authorized either by the common law, or by statute; the condition being that "*John Webb*" the debtor, should keep within the prison bounds laid off by the Justices of the Court of *New Kent*, *until he should have discharged* "*the debt*" *and costs, and save harmless the said John Lacy.* The effects that such a bond might have had on the prisoner, have been too clearly pointed out to need a repetition; and, had the declaration been ever so formal and correct, an action on this bond never could have been sustained, it being void in itself, as having been taken, expressly, contrary to law.

Judgment AFFIRMED,

Reno's Executors *against* Davis and Wife.

Wednesday, November 8th, 1809.

ELIAS DAVIS and *Jane* his wife, (late *Jane Reno*,) brought their bill in Chancery, in *Prince William* County Court, against *Enoch Reno*, and *Bailis Reno* executors of *Francis Reno*, deceased, to recover three slaves, *Aaron*, *Lucy* and *Charlotte*, children of a negro woman named *Sib*, bequeathed to the complainant *Jane*, by the said *Francis* her father. The controversy turned upon the construction of his last will, and particularly of the following clause: "I "give and bequeath to my daughter *Jane Reno* a negro "woman and her increase, named *Sib*, to her and her heirs

1. If one of two coexecutors direct an appeal, writ of error, or supersedeas, originally granted to them both, to be dismissed, the other may proceed without him; and since both are before the Court, an *order* of *severance* may be made without a *summons*.

2. In construing a will, the whole must be taken together, and no particular clause, or clauses selected.

3. The word *increase*, (without the word *future* prefixed,) in the bequest of a female slave is ambiguous; and, if the intention of the testator in using it cannot be ascertained from the whole will taken together, parol evidence is admissible to explain it.

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"for ever, also a negro wench named *Delph*, she and her "increase to her and her heirs for ever." It appeared that, before the date of the will, *Sib* had two children, *Aaron* and *Lucy*, and afterwards, before the testator's death, a daughter, *Charlotte*, all which were claimed by the plaintiffs as comprehended in the bequest of *Sib* and her *increase*.

The testator commenced his will with saying that, "reflecting on the necessity of having his estate divided among "his children by will to prevent disputes among them after "his death," and "as for what worldly property it had pleased God to bless him with, he disposed thereof in the following manner." He then proceeded to make sundry specific devises and bequests, but did not mention the children of *Sib*, except as above. In one clause he bequeathed to his son *George* a negro woman *Celia*, and her children, *Rachel* and *Lidge*, *mentioning their names;* in another, to his daughter *Dolly*, a negro woman *Nell and her increase*, and yet bequeathed to his son *Francis* a negro boy named *Ben*, who was a child of the same woman *Nell*. Before the concluding clause the following was inserted: "It is my "will that *Bob*, and *James* and *Kate* shall be sold or hired "to them that they like, and what stock, household furniture *and remains*, and the money arising from the sale "after deducting the legacies and paying all just debts and "charges, to be equally divided among my children."

The defendant *Enoch Reno* opposed the claim of the plaintiffs; stating in his answer that he never heard the testator make any declaration of his intentions whether the said negro children should pass by the said devise to the complainant *Jane* or not, but conceived it manifestly appeared from the will itself, that when he devised a negro woman *and her increase* he meant the *future* increase, and not children which she had at the time of making the will; in support of which opinion, he relied on the above-mentioned clauses containing bequests to his son *George*, his daughter *Dolly*, and his son *Francis*. He further contended, that since a will takes effect only *from the death* of the testator, the children of a female slave devised in the manner in which

Sib was devised, born before the death of the testator, do not pass to the legatee.

The defendant, *Bailis Reno*, filed a separate answer, in which he declared himself to have been always willing to give up the negroes in question to the plaintiffs, but that the same were in the possession of *Enoch Reno;* that he was *certain* it was his father's intention that the complainant *Jane* should not only have *Sib* and *Delph*, but also all the children that they might have *from the time of making his will afterwards*, because, whenever the said slave *Sib* was delivered of a child, and application was made by the midwife for pay, he sent her to the complainant *Jane*, saying that *Sib* was *her property*, and, as he had nothing to say to her, the said complainant must pay the fees; and also, "because when a child was born it was considered as well by "this defendant and his testator, as by others, to be the "property of the complainant."

A number of depositions were taken to shew the intention of the testator, from declarations made by him at sundry times, and from other circumstances, to bequeath the children of *Sib*, as well as their mother, to the complainant *Jane*.

The County Court decreed to the plaintiffs the negro girl *Charlotte*, born (as aforesaid) *after the will was made*, and dismissed the bill as to the other two children, *Lucy* and *Aaron*. The plaintiffs appealed to the High Court of Chancery, where the following decree was pronounced by the late Chancellor Mr. *Wythe*. "This Court is of opinion that, in "a bequest of a female slave *and her increase*, the term *in-*"*crease* is a *synonyme* with *offspring*, comprehending all her "progeny *whenever born*. To confine the term to such as "shall be born after the testator's death, additional words "seem necessary. Accordingly, where that restriction is "intended, the epithet *future* (*future increase*) is usual. If "the woman *Sib* had not been bequeathed to the daughter "*Jane*, but to some other, and the testator had bequeathed "the *increase* of *Sib* to that daughter, the legatee would un-

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"doubtedly have been entitled to *Lucy* and *Aaron*. She "would have been entitled likewise *if Sib had died before the* "*testator*. If the word *increase were equivocal*, (as, if it, "*ex vi termini*, necessarily comprehended not *all* the chil- "dren of *Sib*, it must be,) this is an instance of that *amphi-* "*bology*, (verbal ambiguity,) where a testator's meaning may "be proved by extraneous testimony. Here is abundant "testimony that the testator intended his daughter *Jane* "should have all the offspring of *Sib*. That such was his "intention is proved by several of his family; by his "friends; by her who performed the obstetric office at the "parturition of one, if not all of the slaves in controversy." The Court, therefore, reversing that part of the decree of the County Court which dismissed the bill as to *Lucy* and *Aaron*, decreed them, together with *Charlotte*, to the plaintiffs; from which decree *the defendants*, *by counsel*, prayed an appeal, which was allowed; but no *appeal-bond* appeared in the record.

The executor *Bailis Reno* refused to prosecute this appeal, and in writing directed it to be dismissed; whereupon *Botts*, for the appellees, moved to abate it for that cause. In support of this motion, he contended, that a direction to dismiss an appeal is equal to a *release of errors*; that a release of *errors* by *one* executor is as good as a release of a debt; and that a release of a *debt* by *one* executor is good as to all, even after summons and severance.(*a*) A decree might have been confessed by *Bailis Reno* to bind both;(*b*) and a dismission of the appeal has all the effect *here* that a decree confessed would have. It may be said that the Court will prefer the course elected by the executor who wishes to prosecute, as being most beneficial to the estate; but what is most beneficial depends on the cause. *Enoch Reno* is for running the estate to expense against the opinion of his coexecutor and of the Chancellor. It is the duty of an executor to avoid useless expense. If he gives up improperly *he* is liable, but the act is binding on the other.

(*a*) 11 *Viner*, 359. pl. 6. p. 360. pl. 13. p. 361. pl. 19.
(*b*) *Ibid.* 359. pl. 2, 3, 4. p. 360. pl. 12.

The doctrine of summons and severance is applicable to *original* plaintiffs only, but not to plaintiffs *in error*.

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Wickham, contra. There are direct precedents in favour of one executor prosecuting a writ of error without the other.(a) The judgment being against them both, and the securities of both being liable, each is interested to relieve himself and his securities. The cases put by Mr. *Botts*, as analogous, of an executor confessing a judgment, and the like, will not hold; because, it is evident, that the executor, and his securities only, are *personally* liable, though the *assets* in the hands of both are bound.

(a) 2 *Str.* 783. *Frescobaldi* v. *Kinaston.*

By an express act of Assembly,(b) any one of several parties may appeal. So where two executors are plaintiffs, (either *originally* or *in error*,) one has a right to go on, though the other refuses.(c) The right of one executor to *release* a debt, or to *release* errors, so as to bar the other from recovering money due the estate, does not conflict with this position; for "such *release* is a *devastavit* in him; yet "if he will not proceed at law it is no *devastavit*; and there-"fore he shall not, by collusion with the debtor, and not pro-"ceeding, keep the other from recovering the assets, and "not create a *devastavit* in himself."(d) All the arguments of Mr. *Botts* are met and refuted in *Viner*.

(b) *Rev. Code*, vol. 1. p. 318. c. 167.

(c) 20 *Viner*, 57. (I. 2.) pl. 5. citing *Co. Litt.* 139. a. & *Sellon's Practice*, 536. sect. ix.

(d) 20 *Viner*, *ubi supra*, in the marginal note, citing *Gilb. Hist. C. B.* 196, 197. *Carth.* 191. 9 *Rep.* 37. *Hemlee's* case.

Another question is, whether any *process* of severance is necessary in this case. I contend that no such process is necessary. The distinction is this; that, where one executor chooses to go on singly, and the other has never been in Court, a *summons* is necessary; but where both are in Court, a mere *order* of severance is sufficient.(e)

(e) 20 *Viner*, 57. (K.) pl. 2. *Ibid.* 55. (G.) pl. 1. citing *Yelv.* 4. *Lord Cromwell* v. *Andrews.*

Saturday, November 18. The Judges delivered their opinions on the preliminary point.

Judge TUCKER. In the case of *Andrews* v. *Lord Cromwell*,(f) it was held that where a writ of error is brought by several, and there is an assignment of errors by one only, *without suing a summons and severance of the others*, it is null and void; which seems to shew that, AFTER SUMMONS, they may be severed, and he who chooses to proceed by himself may.

(f) 1 *Cro.* 902.

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(a) 2 *Cro.*117.

In the case of *Blunt* and *Farly* v. *Snedstone*,(a) the defendant in a writ of error brought by two persons obtained a *release* of errors from one of them; and pleaded it in bar of the writ of error, as a plea *puis darrein continuance*; to which a demurrer was entered in the name of *both* plaintiffs in the writ of error. And the question made was, whether this release should bar *both* or neither of them. And all the Court, after argument, resolved it should bar him only who released; for the plea being by way of action to discharge themselves of damages which were recovered against them, and to be restored to the possession (of lands) which was lost by the first judgment, and they being joined, in the first action, by the act of the plaintiff and not by their own act, it is not reasonable that the act of one should charge or prejudice the other. (But if they had been plaintiffs in record by their own act, (as in debt upon an obligation,) and had been barred in judgment, in error upon that judgment, the release of one should bar the other.) Wherefore it was adjudged that the judgment should be reversed as to him who *did not release*; and that he should be restored to all he had lost; and, as to the other who had released, that he should be barred of his writ of error.

The same reasons, I conceive, will apply to the present case, and therefore am of opinion that the motion be overruled.

Judges ROANE and FLEMING, were of the same opinion.

The Court overruled the motion, "so far as it related to "the abatement of this suit as to the appellant *Enoch*; being "of opinion that the said *Bailis* may discontinue the said "appeal as to himself, but that such discontinuance will be "no cause for an abatement thereof as to the other appellant, "nor any bar to his prosecution thereof alone; and, it ap- "pearing to the satisfaction of the Court that the said *Bailis* "had refused farther to prosecute this appeal, it was ordered "that the same be discontinued as to him."

Thursday, *November* 23. On the *merits*, *Wickham* argued that, by the word "*increase*," children born after the death of the testator only passed; for at the time of the death and not until then, the will speaks. This is a question of intention. If the children living when the will was made had names, it would have been more natural to describe them *by name*, than by the word *increase*. But according to the general usage of the country, the word "*increase*" means *the same as* "*future increase.*" Parol testimony on this subject is improper, as it goes to prove what the testator meant by particular words.

Botts, for the appellees, relied on the preamble to the will, and the general testamentary clauses. The testator, after parcelling out his estate among his legatees, disposes of his household stuff, stock, and *remains*, to his children equally, as residuary legatees. If the word *remains* will cover the two children of *Sib*, who were then in existence, they will pass by that residuary clause; but it is impossible to suppose that he should *particularize* his household stuff and stock, and yet not mention *slaves*, if he intended to comprehend *them* in that clause. Unless, then, the word "*increase*" will include the children born as well before as after the will, he died intestate as to them. *Kennon* v. *M'Roberts*,(a) *Davies* v. *Miller*,(b) *Frogmorton*, *ex dimiss' Bramstone*, v. *Holyday and others*,(c) and *Busby* v. *Busby*,(d) are all cases in which the declaration by the testator of an intention to dispose of his *whole* estate has influenced the construction. The word *increase*, according to its explanation in *Johnson's* dictionary, naturally imports issue born as well before as after any particular time; and the constant usage is to insert "*future*" where it is intended to confine it to future increase.

But if the word be ambiguous, then parol testimony may be admitted to explain it.(e) But, if it were doubtful upon all the other parts of the will whether the testator meant *past* as well as *future* increase, humanity alone should induce the Court to adopt the construction contended for by the

(a) 1 *Wash.* 107.
(b) 1 *Call*, 127.
(c) 3 *Burrow*, 1618. 2 *Bl. Rep.* 535. S.C.
(d) 1 *Dallas*, 226.
(e) 1 *Wash.* 56. *Sheltons* v. *Shelton.* 1 *Term Rep.* 701. *Doe, on the demise of Freeland*, v. *Burt.* 2 *Hen. & Munf.* 622. *Coutts* v. *Craig.* 2 *Call*, 5. *Flemings* v. *Willis.*

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appellees, to prevent the separation of children from their mothers.(a)

Wickham, in reply. With respect to the context, I admit it appears the testator meant to dispose of his whole estate; but the residuary clause carries the whole. In all the cases cited, particularly in *Kennon* v. *M'Roberts*, the preamble was connected with the devising clauses, so as to restrict the *duration*, not the *extent* of the estate.

As to the admission of parol evidence, the rule has never been extended farther than to explain some *latent* ambiguity relative to the *person* intended to take, or *the situation of the property* devised.

In *Sheltons* v. *Shelton*, the main point was that the executors were entitled to the surplus, if it did not pass by the will. The decision then was, that parol evidence was admissible to rebut an *equity*. Again, there were various negroes of the same name, and others given on particular plantations. Parol evidence was therefore admitted to shew the situation of the estate. *Fleming* v. *Willis*, and the case from *Term Reports*, went no farther than *Sheltons* v. *Shelton*. *Coutts* v. *Craig* was a very different case from this; the parol evidence being admitted there in support of the obvious meaning of the instrument, and to rebut an ambiguity raised by the defendant.

(a) 3 *Call*, 17. *Fitzhugh* v. *Foote*.

Tuesday, *November* 28. The Judges pronounced their opinions.

Judge TUCKER. I am not prepared to assign to the word INCREASE, when applied to the gift of a female slave in a will, so extensive a legal operation as the Chancellor has in his decree. Although in some measure a popular expression in this country, I incline to believe it is generally used in a *restricted* rather than a *general* sense, as comprehending the future offspring of the female, and not that already born, at the time of executing the will. Being a word of

this doubtful complexion, it furnishes an instance of that kind of ambiguity in a will, that evidence may be permitted to explain.(a) In this very case one of the executors in his answer insists, and not without a considerable appearance of reason, "that it manifestly appears by the will of his testator, that when he devised the negro woman and her increase, he meant the *future* increase and not children born when the will was made; because he devises by his will to his daughter *Dolly Reno*, a negro woman named NELL, *and her increase*, and devises to his son *Francis*, a boy named *Ben, who was the child of the aforesaid* NELL; nor ought we to forget, that children already born have generally, if not always, proper names, by which they might be clearly designated, as was very justly observed by Mr. *Wickham* in his argument.

But, in the present case, the answer and admissions of *Bialis Reno*, one of the executors, and distributees under the residuary clause in the testator's will, have very great weight with me, and put beyond a doubt the intentions of the testator as attempted to be explained by other testimony.

On these grounds, I think the Chancellor's decree should be affirmed.

(a) *See* 1 *Bro. C.C.* 472. 477. *Fonnereau* v. *Poyntz.* 1 *Fonb.* 118. 201. 427. 2 *Powell on Dev.* 71. &c. 1 *Term Rep.* 701. 703. 2 *Hen. & Munf.* 620. *Coutts* v. *Craig.*

Judge ROANE, without deciding upon the import o the term "increase," taken abstractly, or agreeing that the parol testimony in this case was admissible or proper, further than as furnishing facts necessary to conduct the Court to a proper conclusion as to the intention of the testator, generally to be collected only from the will itself, concurred, that in this case it was the intention of the testator to pass all the infant children; and added that, in a case of doubt, the law of humanity ought to turn the scale, and prevent the separation of the children from their mother.

Judge FLEMING. This case depends upon the construction of *Francis Reno's will*, which rests on the meaning the testator intended to give to the word *increase*. Where words

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or expressions in a will have a doubtful or double import, it is a general, and safe rule, to expound them according to what appears to have been the *intention* of the testator, provided such exposition doth not contravene some known rule of law; in doing which the whole will must be taken together and no particular clause or clauses selected.

The testator in the preamble of his will says, "reflecting "on the uncertainty of life, and the necessity of having my "estate divided among my children by will, to prevent disputes among them, after my death;" and, after saying he was of sound mind and memory, adds "and as for what "worldly property it has pleased God to bless me with, I "dispose of it in the following manner," &c. clearly manifesting an intention to dispose of his whole estate; and, after a number of specific devises and bequests, to his children, (of which he had many,) he adds, "*Item, I give and bequeath* "*to my daughter Jane Reno, a negro woman* and her *in-* "*crease*, named *Sib*, to her and her heirs for ever;" which word *increase* may well be construed to include the children of *Sib*, born as well before, as after the date of the will, and ought to be construed most favourably to the legatees, and to have the same import as if, instead of the word *increase*, he had used the word offspring; and I am the rather inclined to believe that all the children of *Sib* were intended to pass by the bequest, as the word *increase* precedes the name of the mother; and, if the testator had intended that none should pass but those thereafter to be born, he probably would have bequeathed *Sib* and her *future* increase, which would have removed all doubt on the subject. But there is another circumstance in the will that leaves no doubt on my mind, as to the intention of the testator; and that is, that, after disposing of a number of negroes, all except the two in question, specially by name, he adds "and what stock, household "furniture and *remains*, and the money arising from the "sale, (I suppose he meant the sale of the three negroes di- "rected to be sold,) after deducting the legacies and paying "all just debts and charges, to be equally divided among "my children."

Can it be, for a moment, believed that the testator, after having specially disposed of a number of negroes, would have left the two infant children of *Sib* (one of them probably at the breast) to be with his stock, household furniture, and *remains*, divided among his eleven children? It could never, I think, have been his intention; and the word *remains* might be well satisfied with the kitchen furniture, plantation utensils, &c. which he thought too minute to be particularly mentioned.

So much for the *construction* of the *will*, unaided by oral testimony, which I think was admissible to explain the intention of the testator; but, without such aid, I am clearly of opinion the decree is correct, and ought to be affirmed.

Moss and others *against* Moss's Administrator.

1. In debt on a bond given by distributees to indemnify an administrator for dividing the estate among them; the condition being, "that they should pay him "their respective proportions of all debts which he should be *compelled* to pay, that should "thereafter come against said estate;" it is a sufficient assignment of a breach to say, "that "the plaintiff on a day subsequently to the date of the bond, had paid, by the *consent* of the "defendants, a debt which was then due from the estate aforesaid, and which, as administrator, he was *bound* to pay, and that the defendants had not paid him their respective "parts nor any proportion thereof, but the same had refused, although often requested."

2. In an action against *several defendants*, the *capias* being returned executed on part only, who appeared and defended the suit, and a discontinuance as to the rest having taken place, by a failure to take out further process against them, a judgment against the *defendants* in general terms, must be understood as against those only who appeared, notwithstanding the declaration charged them *all* as "in custody," &c. and the *caption* of the entry of the judgment in the order-book, mentioned the names of all.

3. Where there was an action on a joint and several bond, against *six* obligors, and the *capias* (which was against them all) was executed, on *two* only; it was held that the plaintiff was not bound to sue out further process against the rest, but might take judgment against those two.* In such case, it seems indifferent whether the declaration be against those two only, or against all named in the writ, provided the bond be properly described.

4. If the clerk of an inferior Court, misconceive a judgment, and issue execution against any person not properly a party thereto, the remedy is not by *supersedeas* or writ of error, but by motion to quash the execution; and if such motion be overruled, an appeal may be taken to the Court of Error, or application may be made for a writ of error or supersedeas to the order overruling such motion.

THE record in this case stated that *James Moss*, *executor* of *James Moss*, deceased, sued out of the Clerk's office of

* On inquiry of *John Brown*, Esq. clerk of the Supreme Court of Appeals, and who had for many years been clerk of the old General Court, and extremely well versed in its practice, as to the mode of proceeding in the last-mentioned Court, where there were several defendants and part only arrested, his answer was, that the uniform practice had been, in such cases, to proceed to judgment and execution against those of the defendants who had been arrested, and either discontinue the suit as to the others, or go on to get judgments, as they were from time to time arrested, till satisfaction was obtained.

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Prince Edward District Court, a *capias* against *Francis Moss*, *Stephen Moss*, *William Moss*, *John Spiers*, *Richard Davenport* and *Peter Guerrant* in a plea of debt for one thousand *dollars*, damage twenty dollars, returnable to *April* term, 1801; that the same was returned executed on the defendants *Peter Guerrant* and *William Moss*, a copy was left for the defendant *Francis Moss*, (he not being found,) and the defendants *Stephen Moss*, *John Spiers* and *Richard Davenport*, were returned no inhabitants of *Buckingham* County, by *Boaz Ford*, jun. deputy-sheriff, for *Benjamin Morris*. The defendants not appearing, a conditional order was entered against the defendants *Peter Guerrant* and *William Moss*, and an *alias capias* awarded against the other defendants, and *has no return endorsed on it*.

The conditional order "against the defendants *Peter* "*Guerrant* and *William Moss*" was confirmed; and the plaintiff *afterwards* filed his declaration as *administrator* of *James Moss*, deceased, complaining of *all* the defendants above mentioned "*in custody*, &c. of a plea that they render unto "him one thousand *pounds*, current money of *Virginia*, "which to him they owe and from him unjustly detain," &c. proceeding in the usual form on a bond to the plaintiff with a collateral condition, "that whereas the plaintiff had on the "day and year aforesaid, settled with the defendants and "paid them their respective parts of the estate in his hands "put to be administered, if they the defendants, in consider-"ation thereof, should pay unto the said plaintiff their re-"spective proportions of all debts which the plaintiff should "be *compelled* to pay, that should thereafter come against "the estate aforesaid, and should indemnify the said plain-"tiff against all costs and damages accruing on account of "the same, then the said writing obligatory should be void, "or else remain in force." The breach assigned was that the plaintiff "after the date aforesaid, (to wit, on the "day of ,) had paid, by the *consent* of the defend-"ants, on account of the estate aforesaid, a debt to *James* "*Lyle*, for *Henderson*, *M'Call & Co.* which was then due

" from the estate aforesaid, and which, as administrator " aforesaid, he was *bound* to pay: and that the defendants " had not paid him their respective parts thereof, nor any " proportion thereof, but the same had refused although " often thereto requested."

On the motion of the defendants, *Peter Guerrant* and *William Moss*, the judgment obtained against *them* at Rules was set aside, and *they* pleaded that they had performed the conditions of the writing obligatory in the declaration mentioned, on which plea issue was joined.

Afterwards, (to wit, at a subsequent Court,) " *came the* " *parties* by their attorneys, and came also a jury, to wit," &c. On the trial, the plaintiff introduced on his part a *joint and several* bond signed by *all* the defendants, and corresponding with that described in the declaration; except that the bond so described *appeared to be joint*, nothing being said of its being *joint and several;* the deposition of *James Lyle*, one of the partners of *Henderson, M'Call & Co.* (with an account thereto annexed,) stating, " that *James Moss*, adminis- " trator of *James Moss*, deceased, did, on the 15th *October*, " 1796, settle with him the account due from the deceased " *James Moss*, to *Henderson, M'Call & Co.* amounting to " 284*l.* 11*s.* and that the said company is fully satisfied for " the said debt;" and the parol evidence of a witness, " that " he was present one day when the plaintiff and *defendants* " were together, and each of the defendants said they would " pay their proportion of the *British* debt due by the said " estate, without saying what debt; and two other witnesses " who proved a like acknowledgment of *two of the defend-* " *ants*," (not mentioning their names,) " one of whom said " he was ready to pay his part if the plaintiff would furnish " an account of it, which last acknowledgments were subse- " quent to the commencement of this suit, and in a conver- " sation concerning the same." To this evidence the defendant demurred, and the plaintiff joined in demurrer: whereupon, by consent of parties, a juror was withdrawn, and the cause continued for the matters of law arising from the said

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demurrer to be argued. On argument thereof, it seemed to the Court that the law was for the plaintiff; "therefore it "was considered that the said demurrer be *overruled*; "and the suit was continued until the next term; when (to "wit, on the 9th of *April*, 1804) the *parties* came by their "attorneys, and, by consent of *parties*, the issue *joined be-* "*tween the parties in this suit* was set aside; a writ of in- "quiry awarded the plaintiff, and damages assessed to 391*l.* "4*s.* 9*d.* therefore, it was considered by the Court that the "plaintiff recover *against the said defendants*" the said damages and costs.

On this judgment a writ of *fieri facias* issued against *all* the defendants named in the original *capias* and declaration; a forthcoming bond was taken and judgment obtained thereupon. A copy of the records of both judgments (containing also a copy of the *fieri facias*) was presented to a Judge of the Court of Appeals with a petition for a supersedeas *on behalf of all the defendants*. The petition prayed a supersedeas for errors apparent in the record of the *original* judgment, but assigned no errors in that on the forthcoming bond. The supersedeas was accordingly granted to the *original* judgment.

Munford, for the plaintiffs in error. 1. The breach was not sufficiently assigned in the declaration; for the *consent* of the defendants to the payment of the money was no *compulsion* to the plaintiff to pay it. Although an executor, previous to transferring the estate to the legatees, may pay a debt by simple contract (where debts of superior dignity do not interfere) without suit, or any proof of its being just, but his own knowledge; yet, after he has transferred the estate to the distributees, he cannot pay such debt, so as to charge them and compel them to refund, unless the justice of the claim be established by a suit, or by disinterested evidence. It should, therefore, have appeared, and been stated in the declaration, that the claim was so established.

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2. The defendants, though joined in one bond, are liable for their respective proportions only. The breaches therefore should have been assigned *severally*, not *jointly*.

3. The defendants who never appeared, have a right to take advantage of variances between the declaration and *writ*, which, as to *them*, must be considered as part of the record. Now, the *writ* was on behalf of the plaintiff, as *executor*, for a debt of 1,000 *dollars*, damage 20 *dollars;* but the plaintiff declared as *administrator*, for a debt of 1,000 *pounds*, damage 1,000 *pounds*.

4. There was a *discontinuance* against *four* of the defendants, on whom the process never was served; and yet the judgment was rendered against them all. That the *clerk* so understood it is evident from the manner in which he issued the execution; and that such was really the case, Mr. *Munford* argued from a copy of the judgment as entered in the order book of the District Court; which copy, on his motion, was procured by means of a *certiorari*. This entry, bearing date the 9th of *April*, 1804, was *headed* "*James Moss*, "administrator, &c. plaintiff, against *Francis Moss*, *Stephen* "*Moss*, *William Moss*, *John Spiers*, *Richard Davenport*, and "*Peter Guerrant*, *defendants*, in debt." It proceeded, "this day came the parties," &c. (in general terms throughout,) and concluded, "therefore it was considered by the "Court that the plaintiff recover against the *said* defendants "his damages aforesaid," &c. Mr. *Munford* contended, that the entry of the judgment as signed by the Judges must be considered as the *actual* judgment, however erroneous in itself; and that, although no judgment could (*with propriety*) have been rendered against the defendants who were not before the Court, yet the words "against the *said* defend-"ants" must be taken as relating to all who had been mentioned in the same entry. But,

5. If the judgment was not rendered against all the defendants, yet it was erroneous, because the bond (according to the *declaration*) was *joint;* and judgment could not be against *part* of the obligors (the others being alive) until further

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process (*even to outlawry,*) had been taken out against the others who failed to appear; as was decided in *Whelpdale's* case.(*a*)

Wickham, contra. As to the first point, a moral compulsion, or legal obligation was sufficient to compel the plaintiff to pay the debt to *Lyle.* As administrator he was *bound* by his oath to pay all just debts of his intestate; and the word "*bound,*" which is used in the declaration, is equivalent to "*compelled.*" He was not bound to stand a *suit*, which would have injured the distributees by subjecting the estate to unnecessary costs; and it must be presumed the justice of the claim was sufficiently proved to the jury last impanelled in this cause. The demurrer to the evidence is not now before the Court, having been done away by the act of the parties in consenting to set aside the issue joined, on the trial of which issue that demurrer had been tendered. But, if it were, the Court would have a right to infer from the testimony stated in it, every thing which the Jury might have inferred against the party demurring.

But all objections to the declaration and proceedings were waived by the *consent* to set aside the issue and have the cause tried on a writ of inquiry; which was equivalent to a *confession of judgment.* If, in fact, (as Mr. *Munford* contends,) only a part of the defendants appeared, and gave their consent to this entry, the judgment was entered against *them only*, and *they were bound by their consent.* The judgment could not have been entered against those who were not before the Court. The *caption*, or heading of the entry, is always merely formal, and never copied in making out the record for the Superior Court. But if the caption of the entry proves the judgment to have been against them all, it equally proves that they *all consented;* so that, either way, the *judgment* is right. If the *execution* was wrong, it might have been quashed on motion; but it constitutes no part of this record, and furnishes no reason for reversing the judgment.

(*a*) 9 *Co.* 119. a. cited in *Bac. Abr.* tit. *Obligations*, vol. 3. p. 698. *Dublin* ed. vol. 5. p. 165. *Gwillim's* ed.

Mumford, in reply. The force of my argument is, that, although *part only* of the defendants appeared and consented, (for none but those on whom the process had been served can be *supposed*, without an express entry to that effect, to have been before the Court,) the judgment, in consequence of a reference to an erroneous caption, was *understood* by the clerk, and actually *entered* by him, against them *all*.

Thursday, *November* 30. The judges pronounced their opinions.

Judge TUCKER. The appellee, *James Moss*, brought an action of debt in the District Court of *Prince Edward*, against the appellants, upon an obligation to himself as administrator of *James Moss*, deceased; the writ was returned executed on *Peter Guerrant* and *William Moss*, two *only*, of six defendants named in the writ; a copy left for *Francis Moss*, another of the defendants, he being *not* found; and the three other defendants were returned no inhabitants of *Buckingham* County, to which the writ appears to have been directed.

At rules held in the office on the appearance day, a conditional judgment was entered against *Peter Guerrant* and *William Moss*, on whom the first writ had been served; no separate order seems to have been made as to *Francis Moss*, for whom the sheriff had left a copy; but an *alias capias* was *awarded* generally, as well against those defendants who were returned no inhabitants of the county, as against HIM.

The record mentions that *no return* is endorsed upon it; whether it was ever issued does not appear.

By the 33d sect. of the District Court Law, *Rev. Code*, vol. 1. c. 66. p. 79. where the sheriff shall return that the defendant is *not found* within his bailiwick, (which return the law prohibits him from making, unless he shall have actually been at the dwelling-house, or place of abode of the defendant, and left a copy of the writ; *ibid.* p. 122. c. 80. s. 15.)

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the plaintiff may either sue out an *alias* or a *pluries capias*, until the defendant shall be arrested; or a *testatum capias* where he shall have removed into another County; or may, at his election, sue out an attachment against the estate of the defendant to force an appearance. And by c. 66. s. 41. p. 90. (District Court Law,) on the return of the *pluries*, that the defendant is not to be found, the Court, instead of the process to *outlawry* formerly used, may order a proclamation, warning the defendant to appear; which if he fails to do, the same proceedings shall be had, and the same judgment given, as in other cases of default. But here the plaintiff proceeded in neither of those cases although so clearly pointed out by the law. He seems to have contented himself with the service upon two, out of six defendants, and to have proceeded to take a *separate* judgment against them; unless indeed, by declaring against the *whole* six as in CUSTODY, (though the record shews the contrary as to *four* of them,) we must be enforced to understand the judgment as rendered against the whole, instead of the two only, on whom process was served.

According to the practice in *England*, when the plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly, from day to day, and from time to time, as he ought to do, the suit is DISCONTINUED; and the defendant is no longer bound to attend, but the plaintiff must *begin again* by suing out a NEW *original*, usually paying costs to his antagonist, 3 *Black. Com.* 296. We are told by the same author, that the several writs issued in succession to compel an appearance, being grounded on the sheriff's return, must respectively bear date the same day, on which the writ immediately preceding was returnable. *Ibid.* 282.

According to those authorities the omission to sue out the succeeding process prescribed by the act, to compel the appearance of the *four* defendants who were not arrested upon the first or second *capias*, was unquestionably a DISCONTINUANCE of the suit, as to *those* defendants. Consequently

they were not liable to any further proceedings or judgment against them; unless they had voluntarily appeared, and made themselves parties to the suit, as in the case of *Barnett & Woolfolk* v. *Watson & Urquhart.*(a) Whether it appears by the record that they have done so or not, I shall presently inquire. It may be proper, however, to notice in this place, that although a discontinuance is aided *after a verdict*, and even after a judgment by *nil dicit* or *non sum informatus*, that is to be understood where the defendant has actually *appeared*; and not where there has been neither an appearance nor even a *service of process* upon him. The mischiefs and inconveniences of a contrary doctrine would be altogether incalculable.

(a) 1 *Wash.* 372.

An office judgment having been entered against the defendants *Peter Guerrant* and *William Moss*, on whom the writ was returned executed; on their motion the judgment was set aside, and thereupon they pleaded conditions performed, (without praying *oyer* either of the bond, or the condition,) upon which issue was joined and the suit continued.

Afterwards we find the following entry on the record; that at a Court held on the fifth day of *April* next following, came THE PARTIES *by their* ATTORNEYS, and thereupon came a jury, &c. when a demurrer to evidence was filed and the jury were by *consent* of parties discharged from rendering any verdict, (not even assessing conditional damages,) and the cause was continued for judgment on the demurrer to evidence, which being argued at a subsequent Court, the Court was of opinion that the law was for the plaintiff; and thereupon it was considered by the Court, that the demurrer be *overruled*, and the suit was continued till the next term; when, by *consent* of parties, the issue joined in the suit was set aside, and a writ of inquiry *awarded*; which was forthwith executed and damages assessed to 391*l.* 4*s.* 9*d.* and then the record proceeds: Therefore, it is considered by the Court, that the plaintiff recover against *the said defendants* (not naming them) his damages aforesaid, &c. Execution

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appears to have been issued against ALL the defendants *named* in the WRIT; which is the first notice taken of any of them *by* NAME (except *Peter Guerrant* and *William Moss*, on whom the writ was returned executed,) in any part of the proceedings except in the declaration, from the time of awarding an *alias capias* against all those upon whom the writ was not served.

This short abstract of the record exhibits a tissue of *clerical* and *practical* errors and omissions, unfortunately, for the administration of justice, but too frequent in the records brought before this Court. If the fact were that all the defendants named in the *writ* did *appear* previous to the trial of the issue, and plead, and proceed to the trial, there ought to have been a special entry to that effect, as in the case of *Barnett & Woolfolk* v. *Watson*, &c.(*a*) For I can by no means agree, that a person, against whom a suit is brought, shall be charged as if he had appeared, unless the record clearly manifest that he did so. The word PARTIES properly and exclusively appears to apply to those who were already *in* Court; and not to those who, though named in the writ, may possibly have been dead, or absent from the County or the Commonwealth. Three of the defendants named in the writ are returned *no inhabitants* of the *County* to which the writ was directed; no *presumption* of *notice* to THEM is therefore to be made; and nothing short of an actual appearance, in *person*, or by an attorney appearing for them by *name*, so as to be chargeable for a fraud, or misconduct, in appearing for them, without being duly authorized, ought to be received as evidence of an *appearance* by, or in behalf of those defendants, or any others against whom process had not been returned executed. The judgment, therefore, as against all the other persons named in the writ, except *Peter Guerrant* and *William Moss*, if any such were entered, was clearly erroneous. But, here, for want of that *clerical* precision often so much neglected, I am at a loss to say whether any judgment *was* rendered against them, or not. The judgment is against "*the said defendants*," leaving us to guess

(*a*) 1 *Wash.* 372.

who were meant thereby; *all* those *named* in the *writ*, or those *only* upon whom the process was served. The execution indeed shews that the clerk, or his deputy, understood it to be against ALL without *exception*. But I apprehend this Court cannot take notice of the execution, as a *part of the record* in the original suit. As to the judgment on the forthcoming bond, I do not consider that as before us upon *this* writ of *supersedeas* which was awarded only to the *original* judgment, and I think the practice in this Court and the former General Court, *was*, not to consider the judgment on a replevy bond, or forthcoming bond, as brought up by writ of supersedeas, to the first judgment. See *Leftwick* v. *Stoval*, 1 *Wash.* 303. The case of *Sayre* v. *Grymes*, and *Holcombe* v. *Pumal and others*, there cited, seem to have proceeded upon similar principles.(*a*)

(*a*) 1 *Hen. & Munf.* 406. 407.

My first impressions were, that we must understand this judgment, as the course of the proceedings in the cause require that it should be understood: that is, as a judgment against *Peter Guerrant* and *William Moss* ONLY, they being the only parties *named* in the record, who appear to have been SERVED WITH PROCESS, or to have APPEARED thereto, or to have PUT IN ANY PLEA. The question then is, whether the judgment be erroneous, as against THEM, *only*.

The declaration is upon a *joint* bond, entered into by six persons, all of whom were named in the writ; on two of whom it was served, and against the rest an *alias capias* was awarded. I doubted whether, in such case, the plaintiff could go on to trial against the two, on whom the writ was served, and who had appeared, and pleaded to the action, before the others were either taken, or the process, which our act substitutes for the process of outlawry(*b*) had been issued and duly returned; but I am informed both by the bar and by Mr. *Brown*, the clerk of this Court, that the practice not only in the District Courts, but in the General Court, has uniformly been so. Some very strong objections to this practice have occasionally presented themselves to

(*b*) *Rev. Code*, vol. 1 c. 66. s. 41.

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my own mind,(a) which have indeed been rather strengthened by the decision of this Court in *Leftwich* v. *Berkeley*,(b) where the rule laid down by Judge LYONS, President, is, that if it appear by the declaration that there are other obligors in a joint and several bond, who are neither SUED *nor* STATED TO BE DEAD, the judgment against the other obligors is erroneous. The same judge on another occasion said, if it appear that a suit is founded on a joint bond, and the judgment is only against one, it will be arrested by a Court of Error, although no plea in arrest of judgment was filed in the Court below,(c) which is certainly contrary to the current of the late *English* authorities collected in 1 *Saund.* 291. b. note (4.) where the rule seems to be, that it must *appear* that the other obligor *is alive*, otherwise no advantage can be taken of the omission to sue him at the same time, but by plea in abatement. Now it seems to me, that the inconvenience (and perhaps injustice) is full as great, where the plaintiff discontinues his suit against one of the obligors, although named in the writ, as if he had not named him at all in the writ; especially when it appears probable, from the sheriff's return, that the party against whom the process is discontinued, was a resident of the County to which the writ was directed, as was the case with *Francis Moss*, for whom a copy was left. For these and other reasons which I think might be offered, I strongly incline to overrule the practice, although apparently sanctioned by time and by the usage of Courts, for which I entertain the highest respect. We come next to the proceedings at the trial. And here it is contended, that it appears by the bond which is spread on the demurrer to evidence, that the breach is not well assigned in the declaration, the condition being to pay their proportionable parts of such debts as the administrator might thereafter be compelled to pay, whereas the breach assigned is the non-payment of their proportions of a debt, which he was bound to pay, and *had paid* by *consent* of the defendants. But I am of opinion that the breach is well enough assigned, being according to the true intent

(a) See 5 *Co.* 119. 1 *W. Bl. Rep.* 20. 6 *Term Rep.* 328. 1 *Wils.* 78. *Symonds* v. *Parmenter & Barrow.* 1 *Stra.* 473. *Edwards* v. *Carter.*
(b) 1 *Hen. & Munf.* 66.
(c) 1 *Call*, 273.

and meaning of the condition; for, if an administrator or executor be *bound* to pay a debt, and, to avoid the expense of a suit, actually does pay it, with the consent of the legatees or distributees, it is the same as if he had paid it after judgment, and much more for their benefit, than if he had incurred the costs of a lawsuit. The discharging the Jury, without directing them to assess conditional damages, after the demurrer to evidence was joined, was an irregularity by which double trouble and expense to the parties was incurred; and the subsequent setting aside the issue, and *by consent* impanelling a Jury to inquire of damages after a judgment on the demurrer had been pronounced in favour of the plaintiff, appears to me to have been intended as a cure for that irregularity, and to have operated accordingly. I cannot, however, help noticing a *clerical* impropriety in entering the judgment on the demurrer to evidence, viz. that it be OVERRULED, whereas the judgment ought to have been, that the plaintiff should recover against the defendant such damages as a Jury to be impanelled for that purpose should assess, the former Jury having omitted to assess damages conditionally. We come now to the final judgment, which is, that the plaintiff recover against the said defendants his damages, &c. This I was at first inclined to think might be corrected by the insertion of the names of *Peter Guerrant* and *William Moss* (the only defendants who appear to have been before the Court) after the word *defendants* in the judgment, and with this correction, if the other members of the Court should have been satisfied as to the point of practice before noticed, I thought the judgment might be affirmed, as to *those* defendants ONLY, leaving it to the parties, respectively, to proceed, as they may be advised as to those points which could not be taken under consideration upon this record. But I now doubt of the correctness of that opinion; for, upon inspecting the record more minutely, I observe, that the declaration charges ALL the defendants named in the *writ*, as in CUSTODY, instead of charging THOSE ONLY in CUSTODY, upon whom process had been duly served, and naming the rest,

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absolutely VOID. This judgment is therefore *void*, as to those defendants who were not in Court: but it is a JOINT judgment; of course, it would seem to me, that it must be erroneous as to ALL, a judgment being an *entire* thing.(a)

The demurrer to the evidence, I think, discovers another error, not yet noticed. It states certain material evidence given by one witness against ALL the defendants, by which I understand all *named* in the *writ* and *declaration*. It then proceeds to state the evidence of another witness against TWO OF THE DEFENDANTS, without *naming* them. This witness clearly thought he was giving evidence in a cause in which *all* the defendants were parties, since he speaks of TWO OF THEM. Which two were they? The two who had appeared; or two of the four who had not appeared? The evidence might have related only to the latter, and therefore have been inadmissible and improper as to the former. This brings the case within the decision of this Court, in *Barret & Co.* v. *Tazewell*, 1 *Call*, 223. and 2 *Wash.* 281. *Lee* v. *Tapscott*.

Upon the whole, I think the judgment erroneous, as to *all* the defendants, as well those who have appeared, as those against whom the suit was discontinued, and that it ought to be reversed entirely.

Judge ROANE. None of the objections *made* in this case, seem to merit a particular refutation by the Court, except this, that it is *alleged* that the judgment was rendered against *all* the six defendants mentioned in the writ, whereas, the process has been only served upon *two* of them. It seems to me, however, certain, that this is not the case, and that judgment has been rendered against the *two only*. Those *two* had made up an issue with the plaintiff, and had gone to trial, while the others had not been brought in by process, nor had entered their appearance. On the *trial* between the plaintiff and the *two* defendants, a demurrer to evidence had been tendered by the defendants, and joined by the plaintiff, whereupon,

(a) 1 Lord *Raym.* 600. 602. *arguendo*. *Cro. Jac.* 303. *King* v. *Marlborough*. *Ibid.* 304. *Miles* v. *Pratt, &c.*

by consent "of parties," (here undoubtedly meaning only the *two* defendants, who had joined issue and demurred to the evidence,) one of the jurors is withdrawn, and the demurrer to evidence continued to be argued. Afterwards, at the next Court, the record states, came "the parties," and the demurrer to evidence of the "defendants" (*i. e.* the *two*) being argued, judgment is given thereupon for the plaintiff, and the suit is continued till the next term. At which term (continues the record) came "the parties," and by consent of parties, the issue joined between "*the parties in this suit*" (here undoubtedly still meaning the *two*) is set aside, and a writ of inquiry awarded the plaintiff, whereupon came a Jury, who assessed the plaintiff's damages to 391*l.* 4*s.* 9*d.* and a judgment was rendered against "the defendants," (*i. e.* those defendants who had first joined issue and then set it aside,) pursuant to the verdict. Nothing, therefore, can be clearer, in my apprehension, than that the judgment has been rendered against the two defendants only, and not the others.

The setting aside the issue, has, of course, waived all objections to the proceedings on the demurrer to evidence exhibited thereupon. As at present advised, however, I think the judgment of the Court upon that demurrer was correct. With respect to the transcript of the judgment now brought up by *certiorari*; I do not consider this case upon that transcript solely, but upon it in connexion with the record now before us; and striking out the caption thereof, which would certainly not have been properly inserted in making up the record, no difference results, as to the point in question, by the exhibition of this latter transcript.

In this case the damages found by the Jury, are within those laid in the declaration, but exceed those mentioned in the writ. If the matter had been *è converso*, the judgment would *still* have been correct; for, in that case, the damages laid in the declaration would have been *extended* to the standard of those laid in the writ, by virtue of the act of jeo-

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fails.(a) That act declares that, after verdict, (or a writ of inquiry,) no judgment shall be *reversed* on account of a mistake of any *date*, *sum*, name, &c. in the declaration, the same being right in any part of the record or proceedings. In the case of *Hook* v. *Turnbull*, (*MS.*) I gave it as my opinion that, after verdict, all sums, dates, &c. in the writ were, under the act, to be considered as incorporated in the declaration, and would thus correct the mistakes contained therein; but this was only for the *purpose* of *supporting* a judgment. The act, its object being to *support* judgments after verdict, declares that, after verdict, a mistake in the declaration shall not be objected; if the date, sum, &c. be right in the writ or other proceedings. The act, *quoad* dates, sums, names, &c. and for the purpose of *supporting* judgments after verdict, makes the writ a part of the declaration; but there it stops. It certainly does not (for such was not the policy or object of the act) make it, without *oyer*, a part of the declaration in order to *reverse* the judgment. This idea seems to have governed Judge LYONS, in the case of *Stephens* v. *White*.(b) In that case he says, "that now, *by the act of jeofails*, the "declaration may be amended by the *writ*," (no doubt for the purpose of attaining the object of the act as aforesaid,) "since the mistake may be corrected by another part of the "record where the sum is rightly stated; for, although you "cannot have advantage of the writ *to plead a variance*, "without craving *oyer* of it, yet you may apply to it to "amend by, though *oyer* was not taken." So, in 8 *Co. Rep.* 158. *Arthur Blackamore's case*, it is held that, "as to the power "of reformation and amendment, the Courts have power "only to do it *in affirmance* of the judgments of such re-"cords and proceedings." Again, it is held in 1 *Bac.* 164. *Gwill.* edit. that it is "a general rule that the Court will make "no amendment that will *defeat* a judgment; the statutes al-"lowing amendments in *affirmance* of judgments only."

(a) 1 *Rev. Code*, p. 111.

(a) 2 *Wash.* 212.

On these grounds, although the verdict and judgment before us is for more money than the sum stated in the *writ*, yet, being within the limits of that mentioned in the

declaration, I am of opinion, that no objection can *now* be taken in respect of the variance, and that the judgment be AFFIRMED.

Judge FLEMING. This is a case of considerable difficulty; and the first question is, whether, in an action of debt on a bond, where several are jointly and *severally* bound, and only *part* of them arrested, the plaintiff may proceed against such, before he proceeds to outlawry against those who are not arrested, and do not appear; or must go on to proclamation, which, by our act of Assembly, is substituted for the process of outlawry in *England*.

The cases cited from 6 *Term Rep.* 328. 1 *Stra.* 474. and 1 *Wils.* 78. do not seem to apply to the present case. The first was in a joint action of *assumpsit* against two, who were partners in a brewery, for malt delivered to them by the plaintiff. The second was an action of *assumpsit* on a bill of exchange, where the defendant pleaded that others joined him in the supposed promises. And the third was on a *joint assumpsit*; and, one of the parties being abroad, the plaintiff was obliged, according to the *English* practice, to proceed to outlawry against him, before he could go against the other defendant. These cases seem to me clearly distinguishable from the one now before the Court, (which is an action against six defendants, on a joint and several bond,) and at most, relate to *mere* matters of practice, in *England*; and ought, in my conception, to have no effect on the practice here, which has uniformly been, for more than half a century, in cases of this sort, to proceed against such of the defendants as may have been arrested, without regard to others who have never been so, nor entered an appearance; and I am not, at this day, for changing, or disturbing a practice that has uniformly obtained throughout the country, for so great a length of time; especially as I conceive it to be *attended* with no injury to defendants, and is very convenient and beneficial to plaintiffs in expediting justice. I am therefore of opinion, that the plaintiff might well proceed

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against the defendants who were arrested, without going on to proclamation against the others.

But a second objection is, that the plaintiff in his declaration charged those defendants not arrested, as *in custody*: *that* appears to be a mere matter of *form*, in the declaration, and is conformable to the usual mode of declaring in this country, where there are several defendants, and can neither obstruct, embarrass, nor affect, the defence of those who have been arrested, and appeared in Court; and therefore is a matter of no consequence; and, after a discontinuance against those defendants, might be struck out of the declaration.

The *capias* issued the 3d of *March*, 1801, to *Buckingham* County, against *Francis Moss*, *Stephen Moss*, *William Moss*, *John Spiers*, *Richard Davenport*, and *Peter Guerrant*, on which the return was, "executed on *Peter Guerrant* and "*William Moss*, a copy left for the defendant *Francis Moss*, "he not being found; and the defendants *Stephen Moss*, "*John Spiers*, and *Richard Davenport*, no inhabitants of "*Buckingham* County." At the rules held in the clerk's office of *Prince Edward* District Court, (to which the writ was returned,) the 6th of *April* following, the defendants not appearing, a conditional order was entered against the defendants *Peter Guerrant* and *William Moss*, and an *alias capias* awarded against the other defendants; and, no return having been made thereon, and no other process awarded against them, there was a discontinuance of the cause, as to *Francis Moss*, *Stephen Moss*, *Spiers*, and *Davenport*; and, as neither of them afterwards appeared, and voluntarily made himself a party to the suit, no judgment could have been rendered against either of them; though the clerk, notwithstanding such discontinuance, has awkwardly inserted their names in the *caption* of some of the subsequent orders in the cause.

On the 6th of *April*, 1802, the office judgment which had been confirmed against the defendants *Peter Guerrant* and *William Moss*, was set aside, and *they* pleaded that *they* had

performed the conditions of the writing obligatory in the declaration mentioned, and issue was taken thereupon.

At a subsequent day came *the parties*, (to wit, the plaintiff and the defendants, *Guerrant* and *William Moss*, *the only parties then in Court*,) by their attorneys, and a Jury to try the issue; at which trial *the defendants* (to wit, *Guerrant* and *W. Moss*) demurred to the plaintiff's evidence, as insufficient to maintain his action; and, by consent of parties, a juror was withdrawn, and the cause continued. At the next term the demurrer was argued and overruled, and the cause further continued: and at a subsequent day, by consent of *the parties*, (to wit, the plaintiff and the defendants *Guerrant* and *William Moss*,) "*the issue joined between the parties in this suit* " is set aside, and a writ of inquiry awarded the plaintiff;" whereupon a Jury was sworn to inquire of damages, who found that the plaintiff hath sustained damages by the occasion in the declaration mentioned to 391*l.* 4*s.* 9*d.* besides costs; on which verdict the Court gave judgment that the plaintiff recover *against the said defendants*, his damages aforesaid, and his costs. And, whatever advantage the defendants might have had, on a supposition that the demurrer was improperly overruled, their voluntarily withdrawing their plea, setting aside the *issue*, and consenting to a *writ of inquiry*, was a complete waiver of such advantage, if any they had.

It appears to me that whenever *the parties* are mentioned throughout the record, after the common order, it must be confined to the plaintiff and the defendants *Guerrant* and *William Moss*; and, when *the defendants* are mentioned, it refers *exclusively* to them also; as none of the *other defendants* named in the writ and declaration, were ever in Court; and therefore no judgment was, or could have been rendered against either of them. Notwithstanding which, the clerk, misconceiving the judgment, and mistaking the duties of his office, issued a *fieri facias* against the estates of them all; part of which has been levied on two negroes of the estate of *Francis Moss*, on two others belonging to *Peter Guerrant*, and on a negro man belonging to *William Moss*. A forth-

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coming bond was given by *Peter Guerrant*, *Francis Moss*, *William Moss*, and *John Guerrant*, their security, and forfeited, and a judgment on motion, that the plaintiff have execution against the three obligors first named in the bond.

It seems to me that the judgment was properly rendered against *Peter Guerrant* and *William Moss*, the benefit of which the plaintiff is not to lose through the mistake or misconduct of the clerk.

As to the issuing an execution against the six original defendants, taking a forthcoming bond, &c. they must, according to the decision in the case of *Leftwitch & Wife* v. *Stovall*, &c.(a) be considered merely as *ministerial acts*, (unconnected with the judgment which is alone before this Court) and cannot be regarded. "Errors of this sort" (said President PENDLETON, in delivering the opinion of the Court in that case) "can only be rectified by the Court "from whence the execution issued, subordinate perhaps to "the control of this Court; but it must come by appeal from "the opinion of that Court, given upon motion, and cannot "be taken up collaterally upon an appeal from the original "judgment."

(a) 1 *Wash.* 303.

The supersedeas was quashed as to *Francis Moss*, *Stephen Moss*, *John Spiers*, and *Richard Davenport*, "against whom "no judgment hath been rendered by the said District "Court," and the judgment against *William Moss* and *Peter Guerrant* AFFIRMED.

Currie's Administrators *against* The Mutual Assurance Society.

November, 1809.

THIS was an appeal from a judgment of the District Court of *Petersburg*, rendered in favour of the *Mutual Assurance Society*, against *James Currie*, for 291 dollars and 73 cents, being the amount of a quota required from the defendant, (as one of the persons holding buildings in a *town* insured by the said society,) by a resolution adopted on the 25th of *February*, 1805, at a meeting of a board of directors of the said society; which resolution calling for the quota, was signed by "*Al. M'Rae, President M. A. S.*"

By the principles of the original law organizing the society, passed in 1794, houses situated in the *country* and in *towns* were *mutually* assured: every member of the society, whether residing in town or country, became insurer for every other member, and the property insured was mutually pledged to make good the losses, happening accidentally by fire, within the terms of the policy. But experience having evinced that the losses happening in the country bore no proportion to those in towns, the legislature, on the 29th of *January*, 1805, at the instance of a majority of the members of the society either personally present or represented by members of the General Assembly, (as authorized by an act of the 23d of *January*, 1800,) passed another act, *separating the interests and risks of the inhabitants of the* COUNTRY, *from those of the* TOWNS, so that the countryman was no longer liable for losses by fire occurring in towns, nor the townsman for losses occurring in the *country*.

Under the original act of incorporation, the society were authorized to adopt rules and regulations for their government, which they were at liberty, from time to time, to alter and amend.(*a*) In pursuance of those powers, a regulation was adopted, by which the business of the society was to be

1. How far the General Assembly has power, from time to time, to annul or alter acts of incorporation.

2. A member of the *Mutual Assurance Society* against fire, is bound by an act of Assembly varying the terms of the original act of incorporation; such act being passed at the instance of a legally constituted meeting of the said society; although that individual member was not present at the meeting.

3. Where an act of incorporation provides that there shall be "three directors, *out of whom* a president shall be chosen;" it is sufficient if the president be elected by a legally constituted meeting, and at the same time with the other directors; without having been *previously* appointed a *director*.

(*a*) See 2 *Rev. Code, Appendix*, No. 7. p. (75,) (76.)

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managed by a president and fourteen directors; but by the act of 1805, above mentioned,(§ 9.) it is declared, that there "shall be in future only three directors, *out of whom* a presi- "dent shall be chosen;" *provided* that the society should not be prevented from "appointing more than three di- "rectors, if at any general meeting it should be adjudged "that a greater number were necessary for the well order- "ing of their affairs."(*a*) Shortly after the passage of this law, and long before the requisition in question was made, *Alexander M'Rae* was elected president of the board of directors, and three other persons, on the same day, were appointed directors. It does not appear that the PRESIDENT had been previously chosen one of the directors, *out of whom* HE was to be taken; but he was certainly appointed by the same *electoral* body by whom the directors were chosen.

(*a*) *Ibid.* p. (84) § 24.

After the election of the president and directors, a requisition, signed by the president, was made, calling on the *town* members for half a quota, but not on the *country* members. *Currie* resisted the payment of this quota on two grounds; 1st. Because the requisition on which it was founded, was not made under the *original charter*, but under a *subsequent act*, which attempted to increase his risk without his consent; and, 2dly. Whether that subsequent act be, or be not, obligatory on him, the PRESIDENT of the board of directors was not chosen *out of* the directors, according to the act under which he was appointed; and, consequently, there could be no legal call of a quota. The District Court gave judgment for the *Mutual Assurance Society*, and *Currie* appealed to this Court; but, pending the appeal, he having died, it was revived in the name of his administrators.

George K. Taylor and *Call*, for the *appellant*, as to the first point, argued, that the legislature could not lawfully increase *Currie's* risk without *his* consent.

Although the original act of incorporation was, in *form*, a *law*, yet in *effect*, it was a mere *compact* or *agreement*. It

was not uniform and universal; it did not compel every person to become insured; it was not mandatory; but left every person at liberty to agree to, or reject the scheme. [They cited 1 *Bl. Com.* 44. to shew the definition of law.]

A charter is not a law, but a compact between the sovereign authority of the state, and a citizen. In *England* though the parliament enacts every *law;* yet it grants no *charters.* These are granted by the king, who cannot at his mere pleasure revoke them; but they remain unalterable as fate, unless the corporation do some act, or are guilty of some omission which, according to established rules and principles of law, produces a forfeiture. And then it is not competent for the *king* (one of the contracting parties) to determine the question, but belongs exclusively to the tribunals selected to decide all other controversies respecting contracts.

If it be insisted that the legislature, in this case, did not alter the contract, *against,* but *with* the consent of the other party; it may be answered, that the proxies who voted for this change, were delegated to give effect to the charter *as it was;* and that a power to *support* is not a power to *destroy.*

No notice of the contemplated change was given to the minority; and, even if it had, the act of the majority could not bind any dissentient, in relation to a change in the constitution. The members of the society composed one corporate body for the performance of acts within the limits of the charter; but beyond those limits there could be no corporate act.(*a*)

It is a universal principle in the law of insurance, that to change the nature of the risk after the policy is effected, unless with the consent of the insurers, is to determine the contract.(*b*)

The terms of the original charter, which authorized the society to "conclude upon such rules and regulations as they "might judge necessary," and "to alter and amend such "rules," did not give them authority to change the constitution itself. They only related to fixing the amount of the quotas, and to the general conduct of the society.

(*a*) 1 *Domat's Civil Law,* 153. 2 *Pothier on Obligations,* 565.

(*b*) *Marshall on Insurance,* 193.

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Though this judgment was founded on a call for a quota, which the society might always rightfully make, yet the call is not on the *whole* society according to the original charter, but on a *part* only.

The act of 1794 being a contract between the state and the original adventurers, the obligation of such contract cannot be impaired by the state without a violation of the constitution of the *United States*. The obligation *is impaired*, when the legislature say that repartition shall be made among a *part*, and not the *whole* of the members, as was prescribed by one of the fundamental rules of the original charter.

2. There was no legal president, or board of directors; consequently there could be no legal call of a quota.

By the terms of the act of *January*, 1805, there were to be "three directors, *out of whom* the president shall be "chosen." It was indispensably necessary, therefore, that the president, at the time of his election, should have been one of the directors. This not being the case with Mr. *M'Rae*, his election was void.

The appointment of directors was but one step towards constituting a legal board; for, until that was over, it was uncertain who would be president, or who directors. During the interval between the choice of directors, and that of president, they are incapable of action; for they could not by their own energies mature their character; but it depended upon the agency of the society to perfect it, by the appointment of a president. The appointment of a president was a *sine qua non* or indispensable requisite to complete their character, and give them capacity to act; and, until that was done, every attempt to form a board or do any corporate act was a usurpation, and the proceeding void. It is like the case of a lease made by a person appointed bishop of a diocese, who was never ordained or consecrated. For want of this ceremony, he is no bishop at all, and the lease void, though confirmed by the dean and chapter.(*a*)

A corporation, during the vacancy of its head, can do no act but appoint one.(*b*)

(*a*) *Bro. Leases*, 68. 3 *Bac. Abr.* 367.
(*b*) *Co. Lit.* 264. 1 *Bl. Com.* 478. 6 *Vin.* 270.

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The directors were not officers *de facto*, whose acts in certain cases may be valid; but were *usurpers*.

An officer *de facto* is confined to *ministerial* or *judicial* acts, mere matters of office, which he is compellable to perform; or in which a stranger is concerned, and had a right to, or paid a consideration for. He cannot exercise his *will*, or do any *legislative* act. The acts which an officer *de facto* may do, must be such as are absolutely necessary for the *preservation of* the society; such as are expedient to prevent its final dissolution: and not such as contribute to its convenience only.(*a*)

The necessity of the call, in this case, is not proved. It was therefore an abuse of power to make it, which the Court will not enforce. Nor was it necessary for the *preservation* of the society; for that might have existed without it, till the next annual meeting.

(*a*) *Cro. Jac.* 554. *Obrian* v. *Knivan. Andr.* 173. *The King* v. *Lisle.* 2 *Bac. Abr.* 20.

Mr. Hay, who began the reply to the argument of the appellants' counsel, remarked, that the record presented two questions, both of which he conceived might be answered in the negative.

The first question, said he, is this: "Did the failure of the "society to make Mr. *M'Rae*, by a formal election, a direc- "tor, before they elected him president, invalidate the re- "quisition for a half quota, made on the 25th *February*, "1805."

The second is: "Was the requisition which was made on "the owners of town property *only*, void *on that account?*"

The solution of the first question, he said, depends on the act of 29th *January*, 1805. This act declares, "that in fu- "ture there shall be only three directors *out* of whom a "president shall be chosen."

I admit that Mr. *M'Rae*, was chosen president without the *formality* of being previously chosen a director. On the part of the appellant it is conceded, that in every other respect the election was regular and legal, but it is contended

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that, as Mr. *M'Rae* was not first chosen director, and then president, the election was substantially defective.

The difference between the course actually pursued and that presented by the letter of the law, is a difference in form only. If this position is correct, the inference that the election was valid, it is presumed, will not be controverted.

Before we proceed to establish this position, it is proper to explain what is meant by the terms, "an election substan- "tially defective," and "an election defective in form only."

If the law had required that a director should be a citizen, or one of the insured, and the society had elected an alien, or one not insured, the election would have been substantially defective, because the act of making an alien or *a* stranger to the institution a director, would not have made the former a citizen, nor have made the latter a party insured. But where the law, as in this case prescribes, that "a president "shall be chosen out of three directors," the act of choosing a president makes the man *chosen* a director, and gives the qualification required.

To illustrate this idea, let us suppose that the law had been *literally* obeyed. There would have been then four elections; three of directors, and a fourth of a president chosen "*out*" of the directors. But, according to the course pursued, there were three elections only; one of a president, *eo nomine*, and then two of directors. It is obvious that the result is precisely the same. The *effect* contemplated by the law is attained. A president and two directors are appointed. This is precisely what was intended. The society did the act prescribed. They went to the place, indicated by the law, and erred, if they did err, only in taking a shorter road than that which appeared to have been marked out for them. The defect, then, if there be one, is in the manner, in the form of the proceeding, and not in the result of that proceeding.

Would it not be preposterous, Mr. *Hay* asked, to suspend or to embarrass the proceedings of an institution so important to the community, because the society, in occupying the

ground allotted to them by law, had advanced to it by taking three steps instead of four.

The law says, "there shall be three directors, out of "whom a president shall be chosen."

It is obvious that the president was to be a director; and it is equally clear, that the president was to be the principal director, and nothing more.

Now let us suppose that the law had said, "three direc-"tors, out of whom a principal director shall be chosen;" would not the appointment of a principal director, and then of two other directors, have been a rational and substantial compliance with this requisition? If it would, the election in the present case is good; for, whether the head of the institution is called president, or principal director, must be regarded as a circumstance totally immaterial.

In the performance even of covenants, the law regards substance only. If *A.* binds himself by an obligation to *B.* to execute a deed for conveying an estate in land to him, for such uses as he should indicate, by writing under seal; *B.* by such writing, declares that the conveyance shall be made to him, to the use of *C.* in fee-simple, and *A.* instead of conveying to *B.* to the use of *C.* conveys to *C.* immediately, and in the first instance, the contract would be even at law substantially performed. The reason is obvious. The thing required to be done would have been done. If the conveyance had been made to *B.* to the use of *C.* the statute would have executed the use, and *C.* would have been seised in fee. *A.* therefore in conveying to *C.* directly, performed the act really intended by the contract, and the only difference is, that the estate passed from *A.* to *C.* in a straight line, and did not pass circuitously through *B.*

But even if I am wrong in my construction of the act of 29th *January*, 1805, the resolution adopted by the society, on the very next day, is sufficient to justify this election, even in the opinion of the most zealous advocate for form. This resolution declares, that "there shall be three direc-"tors and a president." The words in the law, directing

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the appointment of a president, "out of three directors," are not inserted. If the question then depends on the resolution, the ground of the objection here examined is placed entirely out of view.

But it may be objected, that though the general meeting might, under the 24th section of the act of 1805, increase the number of directors, they were still bound to elect a president *out* of the directors.

This objection is easily repelled. By the original law of incorporation, (of *December*, 1794,) the society were not directed to appoint either a president or directors. They were empowered to appoint as many agents as they thought the business of the institution required, and to name them as they pleased. The power thus given they exercised. They first appointed fifteen agents, calling one of them president, and the other fourteen directors, and after some time, authorized the president and four directors to constitute a board for conducting the business of the society.

The resolution of the 30th *January*, 1805, is manifestly in conformity to the law of 1794, and the practice under it; and the election of *M'Rae*, is in conformity to that resolution. The election therefore is good, unless the law of *December*, 1794, is *quoad hoc* repealed by the act of the 29th *January*, 1805.

But the appellants themselves say, that the law of 1794 was not repealed; they contend, that it *could not* be repealed. It is not, say they, a law, but a contract, and therefore beyond the reach of legislative control. If, then, the law of 1794 is not repealed, and the election is made in conformity to one of its provisions, this part of the subject is disposed of. But I will not avail myself of this argument intended by the appellants' counsel for a very different topic, and I will shew that the act of 1794 *was not* repealed.

By this act, the power of appointing officers, and of regulating elections, is given to the society. The 24th section of the act of 1805, shews that this power was not meant to be taken away. A president and two directors, it is true, are

mentioned, and their appointment is prescribed; but it is expressly declared that nothing therein contained, shall be construed so as to prevent the society from increasing the number of directors, whenever they might think it expedient to do so. The fair inference seems to be, that the legislature wished only to make an experiment with three agents or managers, leaving it however in the power of the society to act as heretofore, if the experiment did not answer the design.

The argument is rendered more forcible by this fact, which, though not stated in the record, may be relied on, because it is authenticated by the history of the *Mutual Assurance Society*, as it is exhibited in our laws. The law was passed on the 29th *January*, 1805. On the next day the resolution was adopted. By whom? the *very men*, who had on the preceding day passed the law. This is the fact to which I allude. The members of the General Assembly are, *ex officio*, the representatives of the unrepresented subscribers, in their respective Counties. When, therefore, on the 30th *January*, 1805, they passed a resolution, in exact conformity to the constitution, as exhibited in the law of *December*, 1794, it is hardly to be supposed that they considered this very law as repealed by the act of the preceding day.

This contemporaneous exposition has been always highly regarded in this country. A very striking instance is furnished by the construction put on the 14th section of our state constitution; a construction to which it is manifest the words of that section reluctantly submit, but to which they have been forced to yield, because it was fixed upon them by the persons who had framed the constitution.

The 14th section alluded to, says, that "the two houses of "Assembly shall, by joint ballot appoint Judges of the Su- "preme Court of Appeals, and General Court, Judges in "Chancery, Judges of Admiralty, Secretary, and the Attor- "ney-General, to be commissioned by the Governor, and "continue in office during good behaviour. In case of "death, incapacity, or resignation, the Governor, with the

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"advice of the Privy Council, shall appoint persons to succeed in office, to be approved or displaced by both houses."

The first sentence of the paragraph provides for the immediate appointment of the Judges. The old government being dissolved, there was of course an end to the judiciary establishment, which formed a part of it. The next sentence of the section provides, that in case of death, incapacity, or resignation, the Governor, with the advice of Council, shall appoint persons to succeed in office, to be approved or *displaced* by both houses. The plain meaning of this sentence unquestionably is, that although the first appointments, from the pressure of the times, were made by the Assembly, vacancies were to be filled by the Governor, with the advice of the Council, by the appointment of persons who were to be approved or displaced by the Assembly. The power of approving or rejecting persons appointed by the executive is the only power given to the Assembly; yet the uniform practice of the legislature, unquestioned by the executive, has been to disregard the appointments made by the executive, and to appoint, whenever they thought proper, persons nominated by themselves alone, without giving any vote for displacing the officer appointed by the executive, or waiting for any farther or other appointment by that body. This, I conceive, to be an erroneous exposition of the constitution; but it was adopted by those who made the constitution itself, and may now be regarded as completely ingrafted in it.

There is a principle, or rather rule laid down in the *British* adjudications, on the subject of corporation elections, which merits the attention of the Court. It is said that the acceptance of a new charter does not abolish the right of election under the first. (See 26 *Vin.* 344. *Burr.* 1656. 1661.) If this position be law, its application to the present case is obvious, and its effect decisive.

It is also laid down to be law, that an election under a by-law is good, although the charter of incorporation may prescribe a mode of election different from that directed in

the former. I confess that this doctrine does not seem to me to be perfectly compatible with some of those principles under the influence of which so many charters were once forfeited, and so many corporations declared to be dissolved. But the Court, by referring to 1 *Stra.* 314. and 2 *Kyd on Corporations*, p. 200. will find the doctrine which I have stated. If this doctrine be correct, its application also must be obvious to the Court.

I will take leave here to remark, that the principle contended for by the appellants' counsel goes farther than they have chosen to acknowledge. They object, it is true, to the requisition only. They have no occasion to go farther, and they keep out of sight, as far as they can, the inference which must follow the admission of their objection. If the requisition is not available, because the election was irregular, every other requisition, every other act of the president and directors chosen on the 30th *January*, 1805, is equally ineffectual and void. In fact the corporation is dissolved. See 1 *Black. Com.* 485.

Thus, if the argument be correct, those who contend that a contract is sacred and cannot be touched by the legislature, are advocating a principle which destroys, at one "fell "swoop," every contract made between the society and its members.

This doctrine of dissolving corporations, in consequence of misconduct in their officers, to whatever extent it may have been carried in *England*, is not admissible here. The position countenanced in many decisions, is, that if a corporation refuse or neglect to appoint such officers, as they are directed by their charter to choose, on the day prescribed, the corporation is dissolved. This is not applicable to the case, to the institution, or to this country.

In the present case there was neither refusal nor neglect. The corporation certainly intended to comply with their charter. Their failure, if any failure occurred, was certainly unintentional. If the members composing a corporate body, peremptorily refuse or wilfully neglect to appoint their officers, at the time prescribed, their conduct may perhaps,

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with some *appearance* of propriety, be regarded as a voluntary surrender of their charter. But where there is only a mistake, the principle does not apply even in *England*. It is there uniformly admitted, that a mayor *de facto*, is competent to the performance of every official act. The person in office is presumed to be duly elected until he is actually ousted by a judgment in an information. 12 *Mod. Rep.* 253. 6 *Vin.* 296. So far has this principle been carried, that where there was a verdict and a rule for entering up judgment against a mayor *de facto*, which rule would be absolute in four days, the Court refused to award a *mandamus* directing the corporation to proceed to the election of a mayor, the office not being considered as vacant until the judgment of ouster was actually pronounced. 3 *Burr. Rep.* 1386.

A rule tending to destroy, or even to suspend for a time, so important an institution ought not to be extended farther than the obvious import of the terms in which it is expressed plainly requires. The failure spoken of in the books, is a failure as to time: the failure here charged, relates to manner only. It is not said that a president was not appointed until it was too late. It is objected only, that he was appointed without having been previously chosen a director. The distinction between a deviation from the law, as to time, and a deviation as to the manner of an appointment is obvious. If the chief officer of a corporation is not appointed when his predecessor goes out of office, the corporation may, with some plausibility, be said to be necessarily extinct. There certainly is a moment at which it cannot perform its functions; and the *English* books say, that its capacity cannot be revived. A new charter is the only remedy. But where the election is made, where the officer is appointed, no such disability ensues, and therefore no such effect ought to be produced.

This high prerogative doctrine, which has been abolished even in *England*, by express statute, has no sort of analogy to the political institutions of this country; and therefore ought not to be regarded. The convenience and welfare of many ought not to be suffered to depend upon the integrity or

attention of a few, unless that dependence necessarily results from the nature of the institution in question. The welfare of the people of *Virginia* must necessarily, in a great measure, depend on the patriotism and wisdom of their representatives; but it would be absurd that the police of a populous city, should be suspended or destroyed, because an appointment which ought to have been made on *Monday* was made on *Tuesday*, or because an election which ought to have been finished by one o'clock, was not concluded until two. The mischief would be incalculable. The debts due to and from the corporation would be extinguished, and its property acquired at a great expense, for schools, work-houses, &c. would revert to the original proprietors. Such a doctrine grew up and flourished in the time of *Charles* II. but it was found to be too rank in *Great Britain*, and was therefore cut up by the roots. It would be folly to transplant it here.

This doctrine, even if generally admitted, ought to be excluded from this particular case. The *Mutual Assurance Society* unquestionably constitute a corporate body; but it is a corporation of a peculiar kind. The society is formed for the express and sole purpose of making contracts both general and permanent. The above doctrine, therefore, even if applied to corporations, whose powers are confined to their own local business and affairs, is not applicable to one, whose transactions are coextensive with the state, and whose existence must necessarily be of the same duration with their contracts. Strange, indeed, would it be, that the society should avail itself of its own neglect to extinguish its own contracts.

But if *M'Rae* was not duly elected, he was not a usurper. He was at least a president *de facto*. A usurper is a mere intruder; one who exercises the functions of an officer without any pretence of right, without even the form of an election. An officer *de facto* is one who has been in fact appointed, but in whose election there is some irregularity or defect, which being proved in an information in the nature of a *quo warranto*, would justify a judgment of ouster against him. 2 *Stra.* 1091. 1 *Kyd on Corp.* 451.

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Now the acts of an officer, of a mayor *de facto*, are good. A prosecution against him makes no difference. Until judgment of ouster is pronounced, his acts are valid, and his right to the office cannot be questioned except in a regular prosecution against himself. 16 *Vin.* 113. 4 *Com. Dig.* 153. 1 *Kyd*, 312.

The policy of this doctrine is obvious, and its influence is general. In some cases it is admitted by the common law, and in some it has been expressly adopted by statute. At common law the acts of an administrator improperly appointed, of an administrator *de facto* are good. 3 *Bac. Abr.* 51. And by statute, (see *Virg. Laws*, 1 *Rev. Code*, p. 58. § 5.) the same principle is expressly adopted as to clerks, sheriffs and magistrates.

Mr. *Hay* then proceeded to the examination of the second question, and contended that the requisition of the half quota, though confined to the town subscribers only, was not for that reason void.

The counsel for the appellants contend, said Mr. *Hay*, that the legislative act which incorporates the *Mutual Assurance Society*, is not a law, but a charter, and that a charter is a contract between the sovereign or state and the grantees of the charter, unchangeable but by mutual consent.

Having stated these premises, the appellants' counsel very logically proceed to the conclusion, that the act of 1805, which separated the town from the country, is repugnant to the law or charter of 1794, under which *all* the subscribers wherever situated, in town or country, entered into a contract of mutual assurance.

They further contend, that the act of 1805, under which the requisition was made is void, because it changes the contracts made under the law of 1794, and because by the constitution of the *United States*, no state can pass any law impairing the obligation of contracts.

This is the substance of the arguments for the appellants fairly stated. To both of these arguments one remark is applicable. The act of 1794 is called a charter; but the act

of 1805 is called a law. This difference in the denomination of the two legislative acts, which seems to be made without any design, is a stroke of great policy. If words are properly called things, names, especially in legal science, may with still greater propriety be called so. This truth is exemplified in this case. By calling the first act a charter, and the second a law, the counsel for the appellants thought that they secured to themselves the power of declaiming against a violation by law of chartered rights. But it is too clear to be disputed, that if the act of 1794 be a charter, and I conclude that it is, the act of 1805 is a charter also, by which the first is amended; and what is more, amended at the prayer and application of the incorporated body. How much is the force of these arguments already diminished by thus calling the acts of the legislature by the names which really belong to them?

But we will examine separately the two arguments just stated. The first assumes a point, which cannot be conceded. A charter is not a compact between the state and the grantee of the charter. On the part of the state there is no contract express or implied. The state is not bound either to give to, or to receive, to do, or to abstain from doing, any thing. On the part of the society, there is no obligation to the state. On what ground, then, can it be said that there is a contract, when neither of the parties enter into any sort of obligation. The idea is absurd. The real character of the act of 1794, is this; it is in truth a charter of incorporation; a grant of certain rights for the benefit of the grantees only; a law authorizing certain persons to become insurers for each other, and to adopt measures adequate to the accomplishment of their plan.

The propriety of this definition, or rather description of the act of 1794, cannot be controverted. It is collected from the law itself. How far this charter, or any other, lies at the direction of the legislature, I will not stop to inquire. But it is manifest that the question is essentially different from that which relates to the control of a legislature over its con-

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tracts. Here there was no contract; but a grant only. Over grants the legislature *have* exercised a control. The Court will remember the case of the lower *James River Company.* They were regularly incorporated; but the legislature had been deceived or were mistaken in a very important point; and, according to the charter, as it stood, the company, who were to be indemnified by a toll for deepening the river, would have received toll for vessels to which *Rocketts* was accessible without the aid of the company. On proof of this fact, the legislature, without ceremony, repealed the law as far as the mischief extended, by exempting from toll many whom the charter bound to pay it. The propriety of this interference was never questioned, at least in Court, although the company had incurred considerable expense, and large quotas had been paid by the subscribers. The money paid was sunk, and in fact the scheme abandoned, by general consent. The question was decided in favour of the last law, by the deliberate judgment of impartial men. The subject was very generally, though calmly discussed; and the company were, I believe, at length convinced, that their *chartered* rights were not quite so good, as the *natural* rights on which their charter had encroached. Nothing but this conviction could have prevented a legal investigation and decision. The society was composed of men who had wealth and influence, and many of them, at least, had no sort of objection to a prosecution, which afforded a reasonable hope of procuring a judicial condemnation of a legislative act. I mention this case to shew not only the opinion of the legislature, but the general opinion of the people.

But it is not necessary for me to contend that the legislature possess the power and control which they exercised in this instance. The case covers more ground than my present argument requires. The proposition for which I contend is simply this; "that where the legislature grant a "charter to an incorporated body, that charter may be altered "by the legislature at the prayer of the corporation itself." Admit, for a moment, that the charter was a compact, the

proposition remains equally true. The parties, that is, the state and the corporation, had a right to alter it by mutual consent. That consent was given. The society in their memorial suggested the identical alterations established by the law of 1805.

But it is objected that the corporation did not unanimously propose these alterations, and that every member of the society, like the members of a *Polish* diet, had a *veto* on the proceedings.

In the first place, it may be answered, that in the memorial no notice is taken of any exception or dissent; nor does the fact of dissent on the part of any member appear in any part of this record. The Court cannot presume such in fact.

Secondly; It is not probable that any objection was made. It would have been scandalous to have made it. The losses in the town were so much heavier than the losses in the country, in proportion to the sums insured in each, that it was palpably unjust to continue the union longer. The proposition was as clear as arithmetic could make it.

But, in the third place, admitting the fact alleged to be true, it is unimportant. A *majority* proposed the change, and a majority had a right to bind the rest. This proposition is very fully supported by 3 *Bac. Abr.* 16. and *Kyd on Corp.* 401.

It may be said, however, that a majority may bind the minority only in cases arising under the charter as it stands, and not in a measure which affects the charter itself. This certainly would be a very rigorous and unreasonable doctrine. A change approved by ninety-nine, is not to be adopted because it is opposed by the caprice of one!

It is not only unreasonable in itself, but unfounded in law. The argument is obvious. A corporation may be dissolved by a surrender of its charter. For instance, the mayor, aldermen and corporation of a city may surrender their charter to the government, and the people will be bound by its acceptance. Now if a corporate body can

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make a surrender for all the inhabitants of a city, surely a *majority* of the corporation may consent to an amendment.

From this doctrine, what inconvenience can result? There is no room for declamation here. By this doctrine chartered rights are not laid at the feet of legislative despotism. If no alteration is made, but at the instance of a majority of grantees, chartered rights are safe. It is idle and visionary to suppose that the grantees will conspire against themselves.

The answer to the second argument is equally obvious and conclusive.

The objection is, that the act of 1805 is void according to the Constitution of the *United States*, because it impairs the mutuality of the contract between the various persons insured.

If it can be proved that the change which was made, I mean the separation of the town from the country, might have been effected if this law had never been made, the objection founded on the constitution, must be considered as unavailing.

At common law the power of making by-laws is an essential ingredient in every incorporated association. 1 *Bl. Com.* 476. 2 *Kyd*, 100. This corporation, therefore, if there be nothing in the original charter which prohibits it, had a right to alter the rate of insurance, if it bore unequally on the members of the society, or to adopt any other measure calculated to produce the same effect. The society, instead of altering the rate of insurance, struck at the root of the evil, and without making calculations, which however correct *then*, might not afterwards apply to a different state of things, separated the interests of the two great classes of the insured.

The act of 1794 contains no such prohibition. On the contrary, they are clearly authorized to act according to their own discretion. By the 2d and 4th sections of the act of 1794, the subscribers are empowered to *examine* the system delineated in the law, to establish such rules and regulations

as they might deem expedient, and to alter them at pleasure. By a fair construction of these sections, the society were authorized to do that which has been since done, and the doing of which gives rise to the present controversy: and there can be no doubt, that if the society, seeing the probability of the events which have since actually occurred, had then divided the town and country interests instead of attempting an apportionment of the rate of insurance, the legality of their act would never have been questioned.

I deem this observation to be conclusive. The words of this law are different from those generally used. Here the members are authorized not only to establish and alter regulations, but they are required to "*examine the system*," and then to establish regulations. Why were they to examine the system, unless after that examination they were at liberty, by their regulations, so to modify it as to make it most conducive to the attainment of the great object of the institution?

But what is the contract which is impaired by the law of 1805, and which law is therefore unconstitutional and void?

The idea of a contract between the state and the society has already been exploded.

The contract is only between the individual subscribers. It has two parts; the first, to pay the quotas required, is implied; the second, giving a lien on the property insured for the quotas, is express. This is the whole contract. How is this contract affected by the act of 1805? The members are still liable to pay the quotas required; the property insured is still bound for those quotas; and the money raised, is devoted to the object indicated by the law —reparation of losses by fire. The only difference is, that the town quotas are applied to the indemnification for losses in town, and *è converso* the country quotas for losses in the country. Each individual is as certain of indemnification now as he was before. The substance of the contract is untouched; and though all the subscribers are not now bound to each, yet the most perfect reciprocity is maintained,

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because now each subscriber is not bound to all. In other words, if the country subscribers are now released from all responsibility for town losses, on the other hand, they are deprived of all claim for contribution upon the towns. I repeat, therefore, that the substance of the contract is untouched; the benefit contemplated by the *contractors*, is as much within their reach as ever, and that it is absurd and irrational to contend that the obligation of a contract is impaired, where every man is bound as fully and effectually as he was before; especially when it is recollected that by an express provision, every individual dissatisfied with the institution may retire whenever he thinks proper.

This measure originated in a suspicion, that the country members paid more than their fair proportion of the losses. Inquiry converted this suspicion into belief. Calculation proved, that though their losses were only two-sevenths of the whole, *i. e.* 20 dollars in 70, they yet paid two-fifths, *i. e.* 28 dollars in 70. This disproportion operating on millions instead of tens, struck the most common observer, and justified the clamour which was raised against the institution. All agreed that the evil ought to be redressed. The only question was as to the mode. Redress might have been obtained by lowering the premiums in the country, or raising those in the towns. But precision, exact equality was not attainable. If either of these measures had been adopted, time would probably have shewn that the calculation had not been correct. It was wise, therefore, to strike at the root of the evil, and to prevent the possibility of controversy by the division which has been made.

A town subscriber is the last person who should murmur at this arrangement. Every day losses in the towns become more improbable. No wooden houses are built; and those which are built of brick are rendered daily more secure against fire.

The act of 1805, therefore, does not impair the *obligation* of the contracts made under the act of 1794; on the contrary, maintaining the contracts in full force, in every

point of any consequence, it places the parties on the footing of exact equality and justice.

Even if the contracts in question were in some degree changed by the act of 1805, the 10th section of the —— article of the Constitution of the *United States*, could not be brought to bear upon the subject; because in the first place the obligation of the contract is not impaired, and in the next, the clause under consideration could never have been intended for a case of this description. The object was to prevent the states from passing laws, as they had done, affecting contracts between individuals; such, for instance, as making lands a tender in payment of debts, or suspending executions; but not to prevent a legislature from changing a charter at the request of the persons chartered. Suppose, when this section was submitted to the convention, a proviso had been proposed, excepting from its operation cases like the present; would not this proposition have been rejected, on the ground that it was unnecessary, the point excepted not being within the purview of the section?

The Court will see, that on several occasions the *Mutual Assurance Society* have acted under the construction here given to the act of 1794; and the propriety and validity of their acts never have been yet questioned. At one time they exempted from sale all property but that which might be thereafter subscribed for, and at another released all those who chose to give up the premiums paid, and abandon the society.

Mr. *Hay* then stated several other cases calculated to shew that the society had uniformly, and without opposition or question, acted under the construction of the act of 1794, which he had before endeavoured to establish.

Mr. *Hay* remarked, that the objection, which states that the risk had been increased by the act of 1805, was manifestly the result of misapprehension. The law had no effect either on the elements, on the habits of the people, or on the situation of the buildings. On these things, and

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these only, the risk depended. The act of 1805, therefore, left the risk where it was before. Nor did it even affect the indemnification. The loser is as secure of redress now as he could have been if the law had never passed.

He then concluded by saying that he had hitherto argued on a supposition that there was a contract between each member of the society, and all the others. This seemed to be the idea which the legislature entertained; but in truth it is not correct. The contract is contained in the policy, and to every rational or substantial purpose is a contract between each individual, and the society in its corporate capacity.

[Mr. *Randolph*, on the same side, argued the cause at great length, and with great ability; but the opening argument of Mr. *Hay*, and the concluding one of Mr. *Wickham*, presenting the subject in every possible view, we have been compelled, in order to prevent repetition, to insert those arguments only.]

Mr. *Wickham*, in conclusion. The counsel for the appellants have insisted that the judgment of the District Court is erroneous on two grounds.

1st. That the Legislature had no right to increase or alter the risk of the appellant without his assent.

2d. That admitting this power to exist, the call for a quota has not been made, in conformity to the act of Assembly, by a president and directors duly qualified.

The terms of the first proposition, as laid down by them, are in some degree vague and indeterminate. The word "*risk*" is applicable to the appellant either as an individual, or as a part of the corporate body. His risk, as an insured individual, is not changed by the act in question; as a member of the body insuring, it may, and must vary according to circumstances, by the increase or diminution of the fund, the accession of new members, or dropping off of old ones, the raising or lowering the premium for new

members, and in various other ways. The words "*with-* "*out his consent,*" may apply to him as an individual or a member. If in the former character, he is bound by the acts of the legislature; if in the latter, by the regulations of the corporate body. No doubt, however, they meant his *individual* assent, and that the fundamental laws of a corporate body cannot be changed without the assent of each member actually given.

In the present instance, they are changed by the authority of the government, and with the assent of the corporate body in its corporate character, but not that of each individual member.

It is admitted, on the part of the appellees, that, as a corporate body, they owe their existence to their fundamental laws and cannot change them.

I will examine the power of the legislature on three grounds; 1st. On general principles; 2d. The Constitution of *Virginia*; and, 3d. That of the *United States*.

1st. On general principles.

The supreme power of a free government, cannot change its own organization. If, for instance, the legislature consists of two branches, one cannot vote the other useless and act without it, nor can the legislature annul the powers of the executive body. By such a change the government would no longer be the same, and a revolution would be effected.

But in every country, whether free or not, the government must have the power of calling forth the resources of the state, of commanding the persons and property of its citizens as the public exigences may require, and occasionally their regulations must embrace only a portion of the community. Laws may be either general or particular; may apply to all the citizens, to particular classes or to individuals. In time of war, for example, they may order out all the militia, or that of particular districts, and may impress the property of individuals. Laws establishing roads,

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ferries, and mills, frequently affect the property of few, and sometimes single persons, and acts divorcing husband and wife, (as in the case of *Turnbull and wife*,) and the sale of lands of infants, (as in that of *Minor and Taliaferro*, 1 *Call*,) are frequently passed, and no one doubts their being within the scope of legislative authority.

Such laws, however well intended, are frequently unjust, or occasionally produce injustice; but they are not the less valid. One at least of my opponents will agree that the act which enforces militia fines on the citizens of *Richmond* more than twice as great as on the citizens of the state at large, is highly unjust, yet he has never contended that it was void.

So too they may create corporate bodies, such as banks, trading companies, and corporations for the government of towns, give them a perpetual existence, and confer on them rights and duties different from those of other citizens. The ostensible object of these laws is the public good, yet in particular instances it may be grossly mistaken, and the law will still be obligatory.

Generally speaking, the power of making laws carries with it the power of revoking them, otherwise, one legislature will possess a greater power than succeeding ones.

If by means of deception on the government, a law is obtained vesting rights in individuals destructive of the public good, and against common right, a power must exist somewhere of annulling such laws; and if there is no particular regulation to the contrary, this power must reside in the legislature, or that body which exercises supreme authority.

But it is objected that laws, such as the one in question, are in their essence contracts, and that the government, being but one of the contracting parties, cannot cancel them without the consent of the other. Admitting them to be contracts, it does not follow that a government is always bound to carry them into effect. Treaties are national contracts, and yet there are cases in which states are warranted

in refusing to execute them. Independent nations acknowledging no superior, have no common judge, and each, taking the consequences of doing wrong, must judge for itself. By contracts with individuals, the state cannot be more firmly bound than by treaties; and individuals who have no means of controlling their decisions, except in extreme cases must acquiesce.

This doctrine it may be objected goes to establish in government "*the right divine to govern wrong*," but what are the consequences of the opposite opinion? If every individual can judge for himself whether a law is according to moral right, and whether the state is authorized in any particular instance to depart from its contract, or has *in fact* violated it, how is obedience to the laws to be sustained? And if a public body is invested with the right of deciding, that body, *quoad hoc*, becomes the supreme power of the state.

Governments, like individuals, are under a moral obligation to do right, and every breach of faith in either, is immoral. Free agency implies the power of doing well or ill, and cannot exist without this power. Error is incident to human nature, and in a doubtful case between a government and an individual, what unerring standard of right can be resorted to?

In ordinary cases, a change of rulers by the accustomed mode of election, is a sufficient security against unjust or unequal laws, and the proper remedy for such as have been enacted.

No doubt laws may be so flagrantly unjust, and oppression so great, as to authorize every individual to refuse obedience, and to stand up in support of the outraged rights of humanity; but when things are brought to this point, the government, no longer answering the purpose for which it was established, ceases to exist, and a revolution is effected. In such a conjuncture the decision is made, not by the ordinary tribunals, but by the people at large. So far on general principles.

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2d. On the Constitution of *Virginia.*

I do not deny that among the infinite variety of modes in which different governments may be organized, the supreme power may be so distributed as that a public body, not having the right of originating or enacting laws in the first instance, may be so constituted as to possess the power of pronouncing on the validity of those that are enacted by the ordinary legislature; and I have no doubt that under the constitution of *Virginia*, there might be laws enacted which this Court would be bound in the ordinary exercise of its jurisdiction to declare null and void. If, for instance, the legislature should take on itself to decide on a controverted judicial question between two individuals, the law would be void as violating that part of the constitution which relates to the organization of the government, and provides that the legislative, executive, and judiciary power shall be kept separate and distinct from each other.

The act in question cannot be said to be an invasion of the power of the Judiciary. In every judicial question there must be a controversy and three parties, the *actor*, *reus*, and *judex*; here the controversy was not decided *by the* law, but *arises out of it.*

The argument drawn from the power of the king of *England* to grant charters but not to annul them, does not apply to a government constituted like ours. This power is a relic of the prerogatives anciently exercised by the *English* monarchs. The supreme or legislative power does not reside exclusively in the king, and he can only exercise his prerogative in the manner sanctioned by the custom of the realm. Being a limited monarch, and entrusted only with the executive powers of government, he is neither warranted by usage nor general principles in revoking or altering charters. He cannot, for instance, alter the charter of *London*, but those of *Williamsburg* and *Norfolk* have been altered again and again by the legislature of *Virginia*, whose power in this respect has never been doubted.

It may be objected, that the general spirit of our constitution forbids any act of injustice, or the violation of a contract on the part of the government. No doubt every government ought to keep in view the great principles of justice and moral right, but no authority is expressly given to the judiciary by the Constitution of *Virginia*, to declare a law void as being morally wrong or in violation of a contract.

If such a power were given, a case might occur, in which the legislature would be right and the Court wrong in its opinion; who then would correct the error of the Court? According to the system of the ancient philosophers of *India*, we are told that the world is upheld by an elephant, and the elephant again by a tortoise, but they still want a support.

Unless, then, the Constitution of the *United States* renders the act in question void, it is obligatory.

That the constitution prohibits the legislature from passing such an act without the consent of the body corporate, I am not disposed to controvert, although it may well be questioned whether it was intended to apply to such a case. The provision in the constitution that "*no state shall pass a* "*law impairing the obligation of contracts*," cannot be understood in the most extensive sense of the words, so as to embrace, for instance, laws for suppressing usurious or gaming contracts, but must have a reasonable construction.

It may perhaps be questioned, especially since the amendment to the constitution which prohibits suits against states, whether this provision applies to contracts with states, and whether in this respect persons contracting with a state stand in a better situation than those contracting with the government of any independent nation.

By the general law of nations, if a subject of one independent state contracts with the government of another, which violates the contract, he is without remedy and has no right to call on his own government to support his right, as he trusted only to the good faith of those with whom he contracted, yet if, without reference to any contract, he has sustained an injury from the government of a foreign state,

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he has a right to call on his own for protection, and a refusal to make reparation is a cause of war.

But admitting this provision in the constitution to apply to contracts with states, any construction that would lead to an absurdity must be rejected. It may not be unreasonable to require the assent of the corporate body in its corporate character; but to require that of every individual member of a numerous body, some of whom must always be disabled by infancy, coverture, absence, disease or other causes that may render their assent impossible, is in effect to declare that no fundamental law of a corporate body thus constituted, shall ever be changed, however just or expedient such change might be.

If, for example, the bank of *Virginia*, instead of the present seat of its establishment, had been fixed at *James Town*, with its branches at *Varina*, *Warwick*, and other towns that are now no more, would it not have been in the power of the legislature, with the assent of the bank in its corporate character, to remove it? or must the business of the bank be transacted in the deserted fields where those towns stood, instead of the seats of commerce where it is now transacted?

The counsel for the appellants, aware of the absurdities to which this general position would lead, have endeavoured to evade them by a distinction which a moment's reflection must satisfy them creates no real difference, and leads exactly to the same conclusion.

They admit the law to be binding on such members of the corporate body as have individually assented to it, but not the others, who were either incapable of yielding their assent, or actually refused it.

One of two consequences must flow from such a state of things; either that the old corporate body continues to exist in its original form and a new one is created out of it, consisting in part of the same members, comprehending the same property, and for the same general objects, which is as absurd as the position in physics, that two bodies can occupy the same space; or else that the individuals of the mino-

rity who have withheld their assent to the change from choice, or inability to yield it, cease to become members of the corporate body, and are no longer under any obligation to conform to its rules. This last conclusion, I presume, is the one the counsel for the appellants would draw from their position. But when it is recollected that the obligations and rights of the members of the corporate body are correlative, and that the individuals who are discharged from the former must lose the latter, they will see that this admission gives up the argument. Many cases might occur in which members of a corporate body would be much more deeply injured by being disfranchised and losing their corporate rights without their consent, than by continuing members and being bound by the acts of the majority; and they are certainly deprived of their rights under the original contract without their consent as effectually in one way as the other.

It must therefore be admitted that the Constitution of the *United States* does not prohibit the legislature of a state from changing the fundamental laws of a corporation, with its assent, given in its corporate character, or that the framers of the constitution meant what was utterly inconsistent both with reason and right.

2d. The call has been made by a president and directors duly qualified to make it. It is admitted that they were chosen at a regular general meeting by a majority of the members present; but it is objected that because instead of choosing four directors in the first instance, and *then* a president *out of these four*, the meeting *first* chose a president, and *then* three directors, the act was not pursued, and the election void. This exposition of the act would be very correct if the electoral body did not continue the same. If, for instance, four directors were to be chosen by the members of the corporate body at large, and these directors were then *themselves* to choose a president out of their own body, it would no doubt be contrary to law, for the members at large to choose a president. But as the president is himself

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one of the directors, (as appears from the various passages in the act,) it is merely a question as to *the order* of election, and there can be no real difference which choice is first made; now the act does not expressly prescribe any order in the choice, and the phrase "*out of whom a president shall* "*be chosen*," may be fairly understood as equivalent to "*one* "*of whom shall be chosen president.*"

For an error merely in point of form, a *quo warranto* will not be granted. 1 *Durnford and East*, 3. *Rex* v. *Stacy*. 4 *Burrow*, 2120. *Rex* v. *Dawes*, and v. *Martin*.

But on either construction of the act, the call was made by a president and directors *de facto*.

The distinction between an officer *de facto*, but not *de jure*, and a usurper, as laid down by all the authorities is, that the former gets possession by a colourable election, the latter without any election whatever. The acts of the latter are void, of the former, good when necessary. This is not to be understood as relating to a necessity in the *particular case*, but a general necessity for *such acts*. Now the objects for which the society was instituted cannot be attained without occasional calls for quotas. The distinction between legislative, executive, and judicial acts, as laid down by the counsel for the appellants is not to be met with in any of the books, and if it were a sound one, is not applicable. Acts of each of these descriptions may, or may not be necessary, and a call under the laws of the corporate body certainly is not a legislative act.

That between acts which depend *on the will* and those that do not, is equally unfounded; the word *necessary* must be understood in its legal sense as equivalent to requisite for the good of the society, and not as relating to a physical necessity. On the whole, therefore, the call was made under an act of Assembly binding on the society at large, and each of the members, and by officers possessing competent authority for this purpose.

[Judge TUCKER declined sitting in this cause.]

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Judge ROANE. In the year 1794, the legislature passed an act, at the suggestion of an individual, "for establishing a *Mutual Assurance Society* against *fire*, upon buildings in this state." It provided for a subscription to the scheme, by individuals, and declared that the *principle* of the assurance should be, "that the *citizens of this state* may "insure their buildings against losses and damages occasioned *accidentally by* FIRE, and that the *insured* pay the *losses* "and expenses, each his share, according to the sum insured." The act contains a few other provisions, which may, also, be considered as forming a part of the *principles* of the institution; but none of them are *perhaps* of so fundamental a cast as this, nor apply so immediately to the case before us. The act further provided, that as soon as three millions of dollars should be subscribed, the subscribers should meet together, *examine* the *system* submitted to the legislature, and conclude on such *rules and regulations*, as to a majority of the subscribers might seem best; and that the *said society* should be at liberty, from *time to time*, to alter and amend the said rules and regulations, as they may judge necessary; and in particular, that they should agree upon the premiums to be paid. The act also provided, that as soon as the society should have acted in the premises, and elected their agents and officers, it should be considered as incorporated by virtue of the act.

It is evident, that every thing touching the question before us, is left to the pleasure of the society itself by this act, or at least, every thing that does not invade the principle before mentioned, or some other principle admitted to be fundamental; and that some of the powers *expressly* recognised by the act, as appertaining to the society itself, (that of fixing and altering the premiums for example,) are equally as important and as liable to be abused as the principle in question; which, it is urged, has been infringed by the act of 1805, effecting a separation between the interests of the towns and those of the country. The power to do

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right, unavoidably involves that of doing wrong; an adequate security to individuals, however, is, that the *general will* of the society finds no motive for injustice or oppression. The true question, therefore, before us is, whether any *fundamental* principle exists in the case at bar, interdicting the separation of the interests in question—and if there be, whether the subsequent legislature had power to invade it?

These questions, and especially the last, involve great and momentous considerations. The near approach of the close of the term, does not allow me time to digest and arrange my ideas upon it, to my satisfaction; but as the interests of the society, and the public, demand a speedy decision, I shall not hesitate to give one.

In order to shew that the act in question is no *law*, and therefore, it is further urged, is a *compact*, and as such is beyond the power of a succeeding legislature, *Blackstone's* definition of municipal law has been relied on. Municipal law is defined by him to be "a *rule* of civil conduct "prescribed by the *supreme* power of the state, *command-* "*ing* what is right, and prohibiting what is wrong;" and it is argued, that the act in question is no *law*, under this definition, for want of the *generality* implied by the term "rule," and because it is said to be not so much in the nature of a command by the legislature, as of a promise or contract proceeding from it. When we consider, that mere private statutes and acts of parliament, are (even by this writer himself) universally classed among the municipal laws of *England*; nay, even that the *particular customs* of that kingdom, are admitted to form a part of the municipal code, it is evident, that this definition of municipal law, is by far too limited and narrow. I would rather adopt the definition of *Justinian*, that civil (or municipal) law, is, "*quod quisque sibi populus constituit*;" bounded only in this country in relation to legislative acts, by the constitutions of the general and state governments; and limited also by considerations of *justice*. It was argued by

a respectable member of the bar, that the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable. This is a position which even the courtly Judge *Blackstone* was scarcely hardy enough to contend for, under the doctrine of the boasted *omnipotence* of parliament. What is this, but to lay prostrate, at the footstool of the legislature, all our rights of person and of property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted?

For my part, I will not outrage the character of any civilized people, by supposing them to have met in legislature, upon any other ground, than that of morality and justice. In *this* country, in particular, I will never forget, "that no free government, or the blessing of liberty, can "be preserved to any people, but by a firm adherence to "*justice*, moderation, temperance, frugality, and virtue, "and by frequent recurrence to fundamental principles."(*a*) I must add, however, that when any legislative act is to be questioned, on the ground of conflicting with the superior acts of the *people*, or of invading the vested rights of individuals, the case ought to be palpable and clear: in an equivocal or equiponderant case, it ought not easily to be admitted, that the immediate representatives of the people, representing as well the justice as the wisdom of the nation, have forgotten the great injunctions under which they are called to act. In such case, it ought rather to be believed, that the *judging* power is mistaken.

(*a*) *Virginia Bill of Rights*, art. 15.

With respect to acts of incorporation, they ought never to be passed, but in consideration of services to be rendered to the public. This is the principle on which such charters are granted even in *England*; (1 *Bl. Com.* 467.) and it holds *à fortiori* in this country, as our bill of rights interdicts all "exclusive and separate emoluments or privileges from "the community, but in consideration of public services." (Art. 4.) It may be often *convenient* for a set of associated individuals, to have the privileges of a corporation bestowed upon them; but if their object is merely *private* or selfish;

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if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privilege. But as it is possible that the legislature may be imposed upon in the first instance; and as the public good and the interests of the associated body, may, in the progress of time, by the gradual and natural working of events, be thrown entirely asunder, the question presents itself, whether, under such and similar circumstances, the hands of a succeeding legislature are tied up from revoking the privilege. My answer is, that they are not. In the first case, no consideration of public service ever *existed*, and in the last, none *continues* to justify the privilege. It is the character of a legislative act to be *repealable* by a succeeding legislature; nor can a preceding legislature limit the power of its successor, on the mere ground of volition only. That effect can only arise from a state of things involving public utility, which includes the observance of *justice* and good faith towards all men.

These ideas are not new; they are entirely sanctioned by the *sublime* act of our legislature, "for establishing re-"ligous freedom." That act, after having declared and asserted certain *self-evident* principles, touching the rights of religious freedom, concludes in this manner: "And "though we well know that this assembly, elected by the "people for the *ordinary* purposes of legislation only, have "no power to restrain the acts of succeeding assemblies, "constituted with powers *equal to our own*, and that, there-"fore, to declare this act irrevocable, would be of *no effect* "in law, yet we are free to declare, that the rights hereby "asserted, are of the *natural rights* of mankind, and that "if any act shall be hereafter passed, to repeal the present, "or to narrow its operation, such act will be *an infringe-"ment of natural right.*" Conforming to the principles declared in this luminous exposition, I infer, irresistibly, that the power of a succeeding legislature is bounded only, (and that in cases of no *equivocal* complexion,) by the principles and provisions of the constitution and bill of rights, and

by those great rights and principles, for the preservation of which all just governments are founded. It is not my intention to go into *detail* on the present subject; but the power of the succeeding legislature is neither to be limited by a state of things, which (as aforesaid) leaves no beneficial result whatsoever, to the community, nor by those petty inequalities and injuries, which arise to *some* individuals or classes of men, under every general regulation whatsoever. I will not say that the reason of the law ceasing, the law itself ought to continue; nor that we are to expect entire and exact justice, under any system whatsoever.

Under the actual case before us, I might, *perhaps*, have spared myself the necessity of this discussion. The principle stated in the act of 1794, which is supposed to have interdicted the separation in question, is couched in terms extremely abstract and *general*. While other principles declared by this act, have clearly and expressly confined the benefits of the institution to *citizens* of this state, and limited insurances to losses occasioned *accidentally by fire*; while it is clearly provided that retribution is to be made by the *insured*, and *that* according to the sum insured, the principle now immediately in question does not seem to prohibit a division or distribution of the members, or their interests into classes, or districts. There was no motive for a restriction upon the society in this particular, especially in an institution of the first impression; and there is no reasonable fear of abuse by the society, of a power equally useful to all, and liable to produce injustice in one quarter as well as another. It was deemed proper to allow to the society the benefit of experience; and as other powers of a character as important as the one before us, were confessedly granted to the society at large, wherefore should *this* be withheld? Referring to the contemporaneous and successive construction of the act of 1794, by the society itself, always acquiesced in by every member, it will be seen that the society itself, *inter alia*, extended assurances to losses occasioned by *lightning* also; (whereas the original act

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seems to have contemplated *ordinary fires* only;) that they excluded from the benefits of the institution certain combustible houses and buildings; and of their own mere authority, and prior to the existence of any legislative provision to that effect, permitted individuals to withdraw from the obligations they had incurred under the original institution. While it is far from my intention to arraign these wholesome and salutary exercises of power, on the part of the society, in general meeting, I contend that these and some other powers are of a character as important, perhaps, as that of effecting a separation.

From these considerations, it would, *perhaps*, result, that the regulation in question did not require legislative aid to carry it into operation, but might have been effected by the society itself. That, however, is taking a broader ground than is necessary to be maintained on the present occasion. That aid having been afforded by the legislature, it is enough for our purpose that the act of 1805, if it has produced any injustice at all to any class of subscribers, has fallen short of that crying grade of injustice, which alone can disarm the act of its operation. The society itself, at least, considered this, on the contrary, as a measure essential to the equalization of the risks; and, in this respect, I see no cause to differ from them in opinion.

By referring to the principle of our law respecting corporations, the foregoing results will be fully justified. Those *artificial* persons are rendered necessary in the law from the inconvenience, if not impracticability of keeping alive the rights of associated bodies, by devolving them on one series of individuals after another. The effect of them is, to consolidate the will of the whole, which is collected from the sense of the *majority* of those who constitute them. This decision by a *majority* is a fundamental law of corporations in this country and in *England;* in which respect our law differs from the civil law; it requiring the concurrence of two thirds of the whole members. It is also a fundamental principle of corporations, that this *majority*

may establish rules and regulations for the corporation, (which are considered as a sort of *municipal* law for the body corporate,) subject only to a superior and fundamental law which may have been prescribed by the founder thereof, or by the legislature which grants the privilege—perhaps, also, these petty legislatures ought further to be limited by all those considerations, (including the due observance of justice,) which I have endeavoured to shew, ought to bound the proceedings of all legislatures whatsoever. If, however, there be no such paramount law, or overruling principle, the mere will of the *majority* is competent to *any* regulation. I have endeavoured to shew, that no principle exists in the case before us to answer the foregoing character; that the one suggested is entirely abstract and indefinite as to the point in question; and that it does not appear that any injustice has arisen, or can be reasonably expected to arise, from carrying the measure in question into operation. But further, a corporation may be extinguished by the *surrender* of its rights and franchises; as to which the unanimous assent of *every* individual is not requisite. The will of the majority must prevail in this, as in other cases. It is not to be expected that this kind of suicide will be committed for *light* causes; and where causes of greater exigency require it, the corporation should not hesitate to make the surrender.

I will put a case, which will exemplify my meaning. By the charter establishing the *College of William and Mary*, it was a *fundamental* law of the institution that a *Divinity School* should be kept up, for promoting a *Seminary of Church of England* Ministers, and another for the instruction of the neighbouring *Indians* in the arts and sciences. Both of these have, by common consent, which amounts, *quoad hoc*, to a surrender, been discontinued in the seminary, although they were required by the fundamental law thereof. A state of things has arisen, which has put down the then established church, and given to *other* sects of religion their equal claims to the benefits resulting from that institution—

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an institution, to the endowment of which, considerable portions of the *public* property were contributed; and as for an *Indian* school, that has been rendered unnecessary, among other considerations, by the change of our relations in respect of those *aborigines*, and from their remoteness at the present day from the seat of that institution.

As it is not expected, that corporations shall exist *for ever*, when the reasons for granting them shall have passed away, and no public utility can ensue from their continuance, this right of surrender must incontrovertibly exist, even in derogation of the fundamental laws and principles. In the case before us, the resolution of the society, on which the act of 1805 was bottomed, may be considered as such surrender, and that act as the acceptance thereof. The interests of the institution commenced thereafter, as it were, *de novo*; and provision was made for a revision, and revaluation of the houses in the towns and in the country, as thus separated. Whether, therefore, the measure adopted by the society in 1805, and sanctioned by the legislature, be considered as a legitimate change, by the society itself, of an *ordinary* regulation, or as a *surrender* which destroyed a *fundamental* one, the effect as to the question before us, is precisely the same.

I have thus despatched, as well as time will permit, the great question on which this case depends. It remains to say, that no act can be done by the society, but in general meeting, as to the time and place of which the law has provided, there shall be full and adequate notice; and this is a sufficient security against surprise. I will also add, that if any class or set of individuals are so peculiarly circumstanced, as that their interests should conflict with those of the majority of the society, while they have undoubtedly contracted to be bound by the suffrages of that *majority*, they are also protected from oppression, by the liberty guaranteed them, of withdrawing from the institution altogether. It is better that an inconvenient member of the

society should be lopped off, than the whole body corporate should perish.

One objection of a minor character yet remains to be disposed of. It is that the requisition, under which the quota in question was demanded, is illegal; it having been adopted by a president not duly elected, it is said, he not having been *previously* elected a *director*.

By the original act of 1794, the power of choosing a president and directors, without any restriction whatever, is admitted to belong to the society at large, in general meeting. By the act of 1805, the legislature has provided that the president shall be chosen *out of* three directors, the whole to be chosen by the meeting; whence it is inferred there must be two separate and distinct elections. The objection in question does not come well from those who contend, that the act of 1794 contains fundamental provisions, which even the legislature is not competent to alter. I will not stop to inquire, whether the society at large acquired an exclusive and indefeasible right in the premises, under the original act of 1794, which will bear out the present proceeding; I will consider the case as standing under the act of 1805 only. I will here remark, that I understand the case agreed, as only admitting that Mr. *M'Rae* was not *previously* appointed a director, by a separate and distinct appointment: I do not understand it to admit, that the society *did not* appoint him a director *eodem flatu*, that they appointed him president. By the terms of the act of 1805, a *previous* election as director is not necessary; and, certainly, there can be no *substantial* reason for giving to it such a construction. There can be no real utility in requiring an unnecessary circuity of proceeding; and as a *previous* election as director, was not required by the act, there was no objection to the society husbanding their time by appointing a president and director (both of which characters are to *combine* in the same person) at one ballot.

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In every view of this case, therefore, I am of opinion, that the judgment of the District Court is correct, and ought to be affirmed.

Judge FLEMING. The appellant, in the Court below, rested his defence on two points. 1st. That *Alexander M'Rae*, who acted as president of the said society, when the said resolution was passed, was not duly and lawfully elected; he not having been, previous to his appointment as *president*, appointed a *director*, as by law directed; and, 2dly. That the *motion* could not be maintained under the act of 1794, for establishing the *society*; the requisition on which it was founded not having been made in conformity therewith; nor under the act of *January*, 1805, lately adopted at a general meeting; the said *act* having attempted to increase his risk, without his consent.

With respect to the first objection, there seems to me to be no weight in it. By a regulation of the society made in the year 1795, its business was managed by a president and fourteen directors. That regulation having been found inconvenient, it is by the 9th section of the act of 1805, declared, that "there shall be in future only three directors, *out of* "*whom* a president shall be chosen." I construe this clause in the act, in the same manner as if the words had been, "there shall be in future only three directors, *one* of whom "shall be president." And as to the mode of his election, it appears to me immaterial whether he was first elected *president*, and afterwards the same day chosen one of the *three directors*, or had been first chosen a *director*, and afterwards elected president; as he was on the same day (and long before the resolution making the requisition in question) both president and one of the three directors; and so it was admitted by the appellants' counsel in the argument, which was perfectly consistent with the true meaning and spirit of the law.

2. As to the second objection, *that*, at first view, seemed to have been of more consequence; but, on due consideration,

that also seems to be unavailing. The first institution of this society, which, as was generally supposed, would be of great convenience and utility to the community at large, was a mere matter of experiment, and which must probably undergo such changes and modifications as experience should point out, in order to make it more equal and extensively useful to the community. In contemplation, then, of these circumstances, the Legislature, in the act that established and incorporated the society, provided by a special clause for the purpose, that "the society, or a majority of them, "shall be at liberty, from time to time, to *alter and amend* "the *rules and regulations* as they may judge necessary." So with respect to the Constitution of the *United States*, which was composed by the collected wisdom of the whole union, after long deliberation it was found on experience to be defective, and to require sundry amendments, which have been already made; and it is not yet, perhaps, quite perfect, which is the inevitable fate of all human institutions.

Of these circumstances Doctor *Currie* was fully apprized when he subscribed, and became a member of the society; and therefore had no just ground of complaint.

A few years' experience taught the society that, under the original constitution, the risk was very unequal between the town and country subscribers, in favour of the former; and therefore it became necessary, in order to do justice to both classes, to separate their interests, as there was much more danger to the town than to the country houses, and therefore, on the principle of equality and reciprocity, a majority of the society, on a representation to the legislature, procured an act of Assembly, passed the 29th *January*, 1805, in which it is declared, that "all premiums and quotas, in fu- "ture, for the assurance of houses in *towns*, shall be applied to "the payment of losses sustained by the burning of houses in "towns, *and none other*. And *vice versa* respecting losses, "by the burning of houses in the country."

But it is objected that this regulation is not binding, because every individual member of the society was not con-

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sulted nor assenting to the regulation. It would be misspending time to refute this argument, as in all institutions of this kind, the acts of a majority are binding on the whole: by the civil law that majority must consist of two-thirds of the members. And the appellants' principal had the less reason to complain, as he was, by the 13th section of the same act, at full liberty to withdraw from the society, on giving six weeks previous notice, and paying all arrearages due at the time of withdrawing.

As to the right of the assembly to alter the charter, I will just observe that it was, in effect, done by the society itself; who in order to give it more validity, did it under the sanction of a legislative act, the same authority by which the institution was established; and I shall only subjoin a very correct note in *Tucker's Blackstone*, on the subject. That "no corporation has been created in *Virginia*, since "the revolution, but by an act of the Legislature; their pow-"ers and privileges must therefore, depend wholly on the "act of Assembly by which they are first established, or "such as have been afterwards made, for the special pur-"pose of *limiting* or *enlarging* their *privileges* respectively."

I, upon the whole, concur in the opinion, that the judgment be affirmed.

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Scott's Executors *against* Trents, Crump, and Bates.

In a suit in Chancery to set aside an award on the ground of a *mistake* of the arbitrators, the defendant by his answer *consenting* that the award may be *opened*, and an *account taken* (*if the complainants choose*) from the *beginning*, but, at any rate, as to certain particulars specified by himself; he is bound to abide by a statement thereupon made by a Commissioner of the Court, refusing to open the account (on *his* motion) from the *beginning*, and professing only to correct the *mistake* alleged by the *complainants*; (notwithstanding such mistake be not proved independently of the report of the Commissioners;) no evidence having been offered by the said *defendant* as to the *particulars* specified by *him*, and no objection to such report appearing, except that the account was not opened from the *beginning*.

THIS was an appeal from a decree of the Superior Court of Chancery, held in *Richmond*, pronounced the 1st of *May*, 1803.

The appellees brought a suit in the *Charlottesville* District Court, upon an open account against *John Scott*, on the 19th of *April*, 1792. The cause, by consent of parties, was referred to *Richard Adams*, and three others, or to any three of them, whose award was to be made the judgment of the court. Previous to the meeting of the arbitrators, (as appears by a certified copy of the instrument hereafter mentioned, brought up since this cause was argued,) *Richard Crump*, for *Trents*, *Crump* and *Bates*, the plaintiffs in that suit, executed an instrument in writing under his hand and seal, (dated *Oct.* 25th, 1792,) whereby they covenant and "oblige themselves "that, if on a reference of the accounts of *Carter and* "*Trent*, *Alexander and P. Trent*, *Prosser and Trent*, "*Carter and Trents*, and *Peterfield Trent*, with *John* "*Scott*, gentleman, there is a balance or balances due "him on such reference, they agree that the said ba- "lance or balances shall be discounted and allowed out of "the debt due from the said *John Scott* to *Trents*, "*Crump and Bates*."

In *September*, 1793, the arbitrators returned their award, dated *December* 10th, 1792, reciting, "that, hav- "ing examined the accounts existing between the par- "ties, and the *other* accounts laid before them by the "parties, they find a balance of 472*l.* 9*s.* 3 1-2*d.* due "from *Scott* to *Trents*, *Crump and Bates*, including in- "terest; which sum of 472*l.* 9*s.* 3 1-2*d. is by consent* "*and desire of the parties*, *balanced* by a *like sum* brought "from an account then under arbitration, between the "said *John Scott* and *Peterfield Trent*, and in part of "the balance due on the said account from the said *P.* "*Trent*;" and they award the same accordingly.

No exception was taken to the award; the court entered judgment in these words: "Therefore it is con- "sidered by the court, that this cause be dismissed; the "parties having consented thereto."

In *March*, 1794, *Trent*, *Crump and Bates*, filed a bill

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in the late High Court of Chancery, the object of which was to set aside this award, as founded in a mistake of the arbitrators, as to the intention of the parties, in the submission to them; suggesting that *Scott* was not to have any credit with *Trent, Crump and Bates*, on their account, for any balance which might be due him from the other parties named in the instrument executed by *Richard Crump*, in their behalf, unless upon an adjustment of ALL the accounts between him and those parties respectively, there should appear to be a balance due upon the aggregate amount of *all* those accounts, instead of a balance upon any *one* of them only; whereas, they had applied part of a balance due from *P. Trent* alone, to the discharge of their account; although there were balances due from *Scott* to three of the other firms, which remain unsatisfied.

Scott, by his answer, insists, that the terms on which the accounts with the complainants were referred were essentially different from the representation in the bill; and, for proof, refers to the instrument executed by *Richard Crump*; and further, that the award shews that all the discounts made therein were with the *consent* of the *complainant*. That, however, as the complainants are desirous and seeking to *open* the said *award*, he accedes thereto, and *prays that an account may be taken* (*if the complainants choose*) from the *beginning*; but, at any rate, in certain particulars afterwards mentioned. An account was accordingly directed; a balance of 620*l.* 1*s.* 9*d.* stated to be due from *Scott*; for which sum there was a decree entered, and an appeal taken to this court; which having abated by the death of *Scott*, was revived by his executors.

Randolph, for the appellants.
Wickham, for the appellees.

Judge TUCKER, (after stating the case as above.) I was at first inclined to think that the suggestions of the

bill were supported by the depositions of the arbitrators, as well as by the instrument executed by *Richard Crump*, above referred to. And on those grounds I thought the case was brought within the principle stated by Lord *Hardwicke*, (3 *Atk.* 644.) and by the master of the rolls, (*Ambler*, 245) as also within that of *Pleasants*, *Shore & Co.* v. *Ross*, (1 *Wash.* 158.) independent of the defendant's consent to open the awards given in his answer. But I entertain some doubts now upon that point; for the arbitrators do not acknowledge any mistake in terms sufficient, as I conceive, to remove the weight of evidence arising out of their award, viz. that the arrangement was made by *consent and desire of the parties.* This is strongly supported by the affidavit of *Mayo Carrington*, one of the arbitrators, who swears that, during the examination of the business, a number of accounts and other papers were exhibited by all the parties present, and that *Alexander Trent*, *Peterfield Trent*, and *John Scott*, were present during the whole time of collating the evidences that were brought forward in the discussion of the business, *P. Trent* representing *Carter and Trent*, and *Carter and Trents*; and on those documents the award was founded and returned.

What strengthens this evidence very much, is, that on the 27th *July*, 1793, more than six months after the former award, two of the same arbitrators made a second award, (in a suit depending in *Henrico* Court, between *Carter and Trents*, plaintiffs, and *John Scott*, defendant; and, in another between *Peterfield Trent* and the said *John Scott*,) in which latter award they proceed upon the same principles as in the first, declaring the application of a part of the balance due from *P. Trent* to *Scott*, to the credit of the latter with *Trent*, *Crump and Bates*, to have been made by the consent and desire of *John Scott*, and *Trent*, *Crump and Bates*. I think therefore the award ought not to be set aside on the ground of mistake in the arbitrators.

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But the defendant having in his answer consented to open the award, and it appearing that one of his executors, who is now a defendant, had notice of the reference to a Commissioner, and actually attended him, and admitted that the claim of *Trents, Crump and Bates* against his testator was properly stated; and having also produced in evidence the statements upon which the referees appointed by *Henrico* Court had made up their award in the suits before noticed, without producing evidence of any errors therein, according to the suggestions made in the answer of *John Scott*, both the report and decree appear to me to be right.

Judge ROANE. Were it not for the consent of *Scott*, stated in his answer, to waive the advantage gained by the award and judgment at law, on condition of re-examining the accounts in relation to the several items stated in that answer, I should *probably* be of opinion that the award should not be disturbed. The evidence of the arbitrators would, perhaps, be too loose to vary the construction of an agreement from that admitted by the *consent of parties*, at the time of rendering *both* awards, as also at that of the rendition of the judgment in the District Court. Besides, the agreement itself of *October* 25th, 1792, is not explicit and unequivocal in support of the construction now contended for on the part of the appellees' counsel. The expression "balance or *balances*," twice repeated in that instrument, would rather seem to *rebut* that construction, and apply to the *separate* balances found in favour of *Scott*, with the several firms, and thus correspond with the construction made at the time of rendering the several awards. But, however this point may be, (as to which I give no conclusive opinion,) the appellants must abide by the admission their testator has made; and on a perusal of the Commissioners' report and the accounts, I see no cause to depart from his report in any of those particulars, and concur that the decree of the Chancery Court be affirmed.

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By both the Judges, (Judge FLEMING not sitting in the cause,) the decree of the Superior Court of Chancery AFFIRMED.

Interest on the amount of a decree of the Superior court of Chancery, pending an appeal from that decree, such appeal having been taken before the act of 1803, was not allowed, notwithstanding the case of *Deans* v. *Scriba*.

After the Court had delivered their opinions in favour of affirming the decree in the above case, Mr. *Wickham* submitted to the Court the propriety of allowing the appellees interest upon the debt from the time of the decree made in the Court of Chancery, until it should be finally affirmed there; and referred the Court to the case of *Deans* v. *Scriba*, (2 *Call*, 420.) the decree in which seems to justify that idea.

Judge TUCKER. With all the respect which I feel for the precedents of this Court, I must be permitted to doubt its power to give such a decree as is now asked for. The powers of this Court are altogether *statutory*. Until the act of 1803, c. 116.(*a*) which passed after this appeal was allowed, I know of no law that gave to this Court the power of giving *damages* upon the affirmance of a decree in Chancery. And if *interest* and *damages* are convertible terms, as perhaps they may be, I cannot think this Court warranted in giving the latter, under the name of the former, in any case which was depending in this court prior to the commencement of that act. The case of *Deans* v. *Scriba* was decided nine years ago, and although there must have been at least a hundred decrees in Chancery affirmed generally since that decision, this is the first application, except in the case of *Taylor* and *Nicholson*, for this court to give interest *pendente* the appeal, that I have heard of: in that case it was refused. Nor do I think we have power to give it in this.

(*a*) 2 *Rev. Code*, p. 29.

Judge ROANE. In the case of *Deans* v. *Scriba*,(*b*) the decree was for a given sum of money, with interest

(*b*) 2 *Call*, 415.

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thereafter, *until paid.* On an appeal by the defendant, this Court declared its opinion to be, "that in all cases "of simple contracts, not bearing interest in their origin- "al, but on which at law interest is given by Juries, in "the way of damages, the interest in equity can only be "continued to the time of entering the final decree." The decree was therefore *reversed*, (*inter alia*,) as to this interest; and by the decree of this Court interest was directed "to be computed, on the balance, to the "time of entering the *final* decree in the High Court of "Chancery, *in pursuance hereof*, the appellants having "unjustly delayed the final decree, by their appeal to "this Court." As the Court of Chancery had no power to allow interest, according to this opinion of the Court, *beyond* the time of entering its decree; and as this Court, reversing a decree, is to render such judgment as the Court below ought to have rendered (*a*) and none other, I do not clearly discern that this decision, though upon a *reversal*, was either warranted by the act just mentioned, so far as it relates to this *ulterior* interest, or by the general spirit of our acts, (of that day,) which did not allow compensation by way of damages, in the event of affirming *decrees* in Chancery. As this decree, however, is said to have been rendered upon great consideration, I have certainly no wish whatever to disturb or depart from it. It is however the case of a *reversal*, which *may* make a difference; whereas, the case before us is that of an *affirmance*. It is true that the ground assigned by the Court for giving this *ulterior* interest in the case of *Deans* v. *Scriba*, also applies to this case, viz. that the appellants "have by their appeal, unjustly delayed the "final decree;" but, on the other hand, as the law had (at that period) allowed no damages on the *affirmance* of decrees in Chancery, probably, as was said by this court in the case of *Skipwith* v. *Clinch*,(*b*) "be- "cause Chancery cases generally depend upon complex "and difficult questions which ought to be settled by the "Supreme Court, and therefore appeals in those, seldom

(*a*) *Rev. Code*, vol. 1. p. 63.

(*b*) 3 *Call*, 38.

"practised merely for delay, are not discouraged," it would seem to be in unison with the same policy, in the case of an affirmance, to omit giving the *ulterior* interest also, if it were even regular in the case of an affirmance, to add to the decree affirmed. This evil, if it be one, is now remedied, except as to prior cases, by the act of *January*, 1804, c. 29.(*a*) which not only gives power to the Courts of Equity to award interest up *to the time of payment*, but also authorizes the appellate Courts to award 10 *per cent.* damages in "satisfaction of all interest or damages," from the time the decree was rendered.

(*a*) *Rev. Code*, 2 vol, p, 29,

On these grounds I am of opinion that no addition, in respect of this ulterior interest, should be made to this decree of affirmance.

Brickhouse *against* Hunter, Banks & Co.

Argued at *April* term, 1809. Decided at *October* term, 1809.

THIS was an appeal from a decree of the Superior Court of Chancery, held at *Williamsbugh*, pronounced on the 9th of *April*, 1803.

Brickhouse brought an action of *account render*, against *Isaac Smith*, one of the partners of *Hunter*, *Banks* & *Co.* and obtained a judgment for an account. In pursuance of which, auditors were appointed by the Court; and, at a subsequent day, at the instance and on the motion of the parties, three other auditors were added to the former number, and any three of the whole, were directed to examine, state and settle all accounts be-

1. Although consent of parties cannot give jurisdiction to a Court of Equity; yet, (after an injunction granted improperly,) if the parties refer all matters in difference between them in that suit, to certain arbitrators mutually chosen; consenting that their award may be made the decree of the Court, such consent is binding; the whole case, including the question of *law*, being thereby transferred from the Court to the arbitrators.

2. An award is not the less *certain* and *final*, because the arbitrators refer to a report previously made by a Commissioner in Chancery, and declare (*in general terms*) their concurrence with it, instead of *specifying* the particulars or substance thereof, in the award itself; nor because they submit to the Court the propriety of their award in point of law, and as a guide for the Court in deciding upon it, state the grounds and reasons thereof.

3. In a settlement of accounts between copartners, the books of the copartnery are admissible evidence, and vouchers for every *item* need not be produced.

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tween the parties, which was accordingly done; and, no exception being taken to their report or proceedings, final judgment was rendered pursuant thereunto, in favour of *Brickhouse*.

To this judgment, *Hunter, Banks & Co.* preferred a bill of injunction to the Judge of the High Court of Chancery, who awarded the injunction. The accounts were referred to a Commissioner of the Court, who made a report which, on exceptions taken to it, was recommitted by the Court to the Commissioner, who made a second report, assigning reasons in support of the former, by which he had reported 118*l.* 9*s.* 7*d.* 3-4 to be paid to *Hunter, Banks & Co.* with the addition of 50*l.* paid by *Isaac Smith* on account of the judgment at law, the voucher for which had not before been produced; making in all 168*l.* 9*s.* 7*d.* 3-4. On the 29th of *May*, 1800, the Commissioner certifies, that the parties appeared by consent at his office, and agreed, that if any supplemental report appeared necessary, it might be made. But the Commissioner declined making any; after which, (as is *presumable*,) by *consent* of the *parties*, all matters in difference between them in that suit, were referred to the final determination of *Thomas Newton* and *William Pennock*, whose award, or that of an umpire to be chosen by them, was to be made the final decree of the court. They made a report, declaring that they had examined the accounts between the parties, and could find no cause to disagree with the Commissioner in his report. "Submitting, however, to the decision of "the Court, the necessity of *Hunter, Banks & Co.* pro- "ducing vouchers to certain charges (amounting to "133*l.* 9*s.*) objected to by *Brickhouse*," (before the Commissioner.) They add, having considered the situation of the times (1781 to 1783, during the *American* war) when much of the business was done, they conceive it was not possible to obtain receipts, as, in many instances,

advances were made on the sea-shore roads, &c. for the safety of removing goods; in which case only, memorandums of the advances could be made. Under which circumstances, they consider the Commissioner's report to be as just as the times of transacting the business would admit of, which they submit to the Court.

The Chancellor of the *Williamsburgh* district, to which the cause had been removed, being of opinion that, *Brickhouse* being a partner, and having a right to inspect the books of *Hunter*, *Banks & Co.* they were admissible evidence; and concurring in opinion with the arbitrators, that, from the circumstances of the country, it would have been impossible to produce vouchers for every item in the accounts, decreed according to their report; from which decree an appeal was taken to this Court.

Randolph, for the appellant, relied on the following points:

1. That the judgment in the action of *account* was not liable to be examined in equity, on any ground stated in the bill. If it be said that the submission to reference was a waiver of the objection to a want of jurisdiction in the Court, the answer is, that exceptions were filed at the coming in of the report of the referees, expressly objecting to the admissibility of the books of *Hunter*, *Banks & Co.* as evidence.

2. The referees do not substantially and independently decide the cause, but delegate the power given them to the Master Commissioner.

3. The award is erroneous on its face: the referees only say that they see no cause to differ from the statement made by Master Commissioner *Dunscomb*, and submit to the Court the propriety of allowing certain items without vouchers. In fact, there was no other evidence before them than the books of *Hunter*, *Banks*

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& *Co.* which were not evidence for them in their own case.

Williams and *Warden*, for the appellees, contended, that *Brickhouse*, by agreeing to the reference in Chancery, had opened the judgment at law, and waived all objection to the jurisdiction of the Court.

The award was final and conclusive between the parties. The only possible objection to it was, their submitting to the Court, whether, under the circumstances, it was incumbent on *Hunter*, *Banks & Co.* to produce vouchers in support of certain charges. They decide that vouchers were not necessary. This they had a right to do, and their decision upon the case in matters of *fact*, cannot be reviewed by the Court, when no corruption or partiality appears.(*a*) Even if they had taken the opinion of Master Commissioner *Dunscomb*, the award would not have been erroneous on that account. Arbitrators may take the opinions of others as a guide to their own decisions; and when adopted, it makes it their own act.(*b*)

(*a*) 1 *Ves.* jun. 369. 2 *Ves.* jun. 15. *Morgan* v. *Mather.*

(*b*) 5 *Ves.* jun. 848. *Emery* v. *Wase.*

The books of *Hunter*, *Banks & Co.* who were partners with *Brickhouse* in the vessel which was the subject of this controversy, were clearly admissible evidence under the authority of the case of *Fletcher* v. *Pollard*.(*c*) They were the books of all the partners, *quoad* this transaction, each having a right to inspect them. In truth, *Brickhouse* has received considerable credits extracted from the books alone, and it is contrary to all principle, to permit a party to claim credits from books, without admitting their debits also.

(*c*) 2 *Hen. & Munf.* 543.

Judge TUCKER, (after stating the case,) proceeded: That the Judge of the High Court of Chancery, ought not to have awarded the injunction prayed for, after the judgment in the action of *account render* had been

regularly and duly obtained, without any exceptions taken, either to the report of the proceedings of the auditors, a part of whom seem to have been nominated and agreed to by the parties, I am much disposed to think. For the action of *account render* comes the nearest to the proceedings in a Court of Equity, of any other that I recollect at the common law. But the voluntary consent of the parties to the reference made by the High Court of Chancery to the final determination of *Thomas Newton* and *William Pennock*, judges chosen by the mutual act and consent of the parties, appears to me to do away the objection to the Court's sustaining the bill, instead of dissolving the injunction upon the coming in of the answer of *Brickhouse*; and, though I was at first inclined to doubt whether the arbitrators had made an award or not, upon more mature consideration and inspection of it, I am satisfied it is a good award in equity, and therefore that the decree be affirmed.

Judge ROANE. The reference by consent in this case, is a waiver of the objection, (if it would otherwise have availed the appellant,) that the appellees were concluded by the decision in the action of account in *Northampton* Court. This cause (the injunction) made the merits of that decision a part of the matter in controversy to be decided on in it; and the whole case, including this question of law, was transferred from the Court to the arbitrators.

The award of the arbitrators (*Newton* and *Pennock*) adopts the report of the commissioner *Dunscomb* as their report, and decides that vouchers were not necessary to be produced, for the reasons stated in the latter part of the award. It is true it also submits to the Court the propriety of this decision in point of law, and, as a guide for the Court in declaring upon it, states the grounds and reasons of their opinion in this particular.

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In this case, this award comes up to what seems to have been required by this Court in the case of *Pleasants v. Ross*,(a) namely, that where an award is to be impeached on the ground of a mistake of the arbitrators as to facts or *principles*, such mistake ought to appear *on the face of the award* itself; and that such mistake is not to be proved by *affidavits*, which are only proper to establish partiality or misbehaviour in the arbitrators, or the like.

(a) 1 *Wash.* 158.

The award before us then is final; but it has gone on to aid the Court (by stating a special matter on the face of the award itself) to decide whether the arbitrators were mistaken in the *principles* of their decision or not; and this brings us to that question.

It seems to me, that for the reason assigned in the award itself, and more particularly for those assigned in the decree in question, vouchers were not necessary to be produced. Those reasons are, (as resulting from those two documents,) the situation of the times when the advances were made; that the appellant was a voluntary partner of the appellees, who acted as ship's husband, with his consent and by his ratification; that, as a partner, he had always a right, and undoubtedly the opportunity to inspect the books of accounts; that, from the confidence resulting from his being a partner, the less care would have been taken by the appellees to preserve the vouchers, than would be thought necessary in the case of unconnected strangers; that, from the nature of most of the articles mentioned in the account, they seem necessary for a schooner engaged as the *Buckskin* was; and that it is unreasonable that the appellant, who had availed himself of the books of the appellees when in his favour, should object to them on the ground of the want of vouchers, when they went to charge him.

On these grounds, I think the Court of Chancery rightly judged that the *principles* on which the arbitrators went as to the point in question, were not mistaken

nor illegal; and this opinion making the award perfect, the said Court was correct in decreeing pursuant thereto. I am therefore of opinion, that the decree should be AFFIRMED.

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Judge FLEMING. The reasons stated by the Chancellor himself, as the foundation of his decree, appear to be perfectly satisfactory. I have only to add, that the decree is to be AFFIRMED, by the *unanimous* opinion of the Court.

De Lima *against* Glassell's Administrator.

Monday, November 6th, 1809.

A discovery, since a trial at law, of new evidence, which, with *ordinary diligence*, the party might have known and obtained in time, is not a sufficient ground for a Court of Equity to grant a new trial.

AN action on the case was instituted in the District Court of *Fredericksburgh*, on behalf of *De Lima*, against *Glassell*, owner of a brig called the *Janet*, for failing to deliver a cargo of corn, received on board the said vessel, on account of the plaintiff, in the month of *May*, 1793, to be carried from the river *Rappahannock* to *Oporto*, in *Portugal*. The *capias* issued, returnable to *April* Court, 1794. At *August* rules, in the same year, the defendant pleaded not guilty; and on the 6th of *October*, 1797, (no motion for a continuance being made,) a Jury was empannelled, and rendered a verdict in favour of the plaintiff, for 1,900*l.* 8*s.* 8*d.* damages. A motion for a new trial was made and overruled, and judgment entered according to the verdict.

The defendant thereupon applied to the late Judge of the High Court of Chancery, for an injunction and new trial of the issue at law; setting forth in his bill, that the corn, which appeared sound and good when ta-

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ken on board, was discovered, when the vessel (which was perfectly dry and tight) arrived in *Hampton Road*, to be in a heated and ruinous condition; that in consequence thereof, the crew refused to proceed to sea with the cargo in that state, alleging it would destroy the vessel, and of course their lives; that *John Griffith* the captain, called on three experienced masters of vessels then in the port of *Norfolk*, to view and report the state of the cargo; and that they were of opinion, that he could not proceed on his voyage, without imminent danger of the loss of the vessel and crew; that, thereupon, the cargo was landed at *Norfolk*, and deposited in large airy warehouses hired for that purpose, in order to dry it as soon as possible; taking care, as far as could be, to separate the sound from the unsound, by which means about a thousand or twelve hundred bushels of sound corn were saved; the residue being totally or in part spoiled; that, as soon after the state of the cargo was discovered as the course of post would admit, the complainant wrote to *William S. Stone*, agent for *De Lima*, requesting him to come to *Norfolk* and direct what should be done; that the said *Stone* came down, but refused to have any thing to do or say to the cargo, although the complainant offered, if he thought proper, to reship the corn after it was dryed, and to proceed to the port designed; that, upon his refusal to give any direction, the master of the brig caused the cargo to be sold at public auction, and deposited the amount of sales, being 456*l.* 15*s.* 1*d.* in the hands of the complainant, who offered to pay it to the said *William S. Stone*, as agent for *De Lima;* but he refused to receive it, and brought the suit at law in the name of *De Lima;* that *since the trial of the said suit, and not before*, the complainant had been informed by sundry persons of credit, that a great part of the corn made in the year in which that shipped on board the *Janet* was made, and especially the corn made in the

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neighbourhood from which that in question was shipped, was much injured by the early frost; and that the injury was in the *heart* of the grain, while the *surface* remained fair, and apparently unhurt; that the corn in question was beaten out in rainy weather, in an open barn, or at least upwards of 6,000 bushels; and that, in the same year, corn which was *apparently* sound, was known to have rotted in the barns of the farmers.

The injunction having been granted, *William S. Stone*, as agent for *De Lima*, answered the bill, stating, among other things, that he believed there was nothing peculiar in the nature of the corn; that probably the damage sustained proceeded from the delay of the master, (who was compelled by a criminal prosecution, to appear at the District Court of *Fredericksburgh*,) and his negligence in suffering the corn to be taken on board in wet weather, and in not keeping the hatches closed and opened at proper periods to shelter it from the weather or expose it to the air; that at the trial at law, all parties were considered as prepared; and that, upon the motion for a new trial, *all* the suggestions in the bill, including the one that the corn was inherently bad, were *repeated, though copiously dilated upon before the Jury.*

On the bill and answer, the Chancellor dissolved the injunction, whereupon the complainant filed a general replication, and commissions were awarded.

A great number of depositions were taken on both sides; among which were those of four of the Jury, who swore there was no such evidence before them as that contained in certain depositions exhibited by the complainant; (shewing that the crop of corn made in 1792 was generally injured by the frost, and, when put in bulk, was heated and spoiled, though fair and sound in appearance; and that a vessel loaded with damaged corn could not safely proceed to sea;) except that of a captain *Lambert*, who thought there would be no danger to a

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vessel going to sea with such a cargo, and said he had known an instance of a cargo of grain being heated at sea, and that no such consequence ensued. All the other evidence now introduced by the complainant appeared to have been before the Jury, except two depositions of *John Griffith*, which were not permitted to be read on the trial at law.

The complainant having died, the suit was revived in the name of *Anthony Buck*, his administrator; and on the final hearing, the Court reinstated the injunction, and ordered a new trial at common law; from which order an appeal was taken.

Williams and *Warden*, for the appellant, contended, 1. That, on the face of the bill, the complainant had full remedy at law, and no ground for coming into equity. No suggestion is made of *fraud* or *surprise;* and no good reason assigned for the failure to produce all the evidence in question at the trial. The bill, therefore, should have been dismissed, notwithstanding there was no plea to the jurisdiction.(*a*)

(*a*) *Pollard* v. *Patterson*, 3 *Hen. & Munf.* 67.

2. If the Court of Law *erroneously* refused a new trial, the proper remedy was by bill of exceptions and appeal to this Court; not by *injunction*. A contrary doctrine would make a Court of Equity a Court of Appeals to the Courts of Common Law.

Randolph, for the appellee, (besides arguing very fully on the merits,) relied on *Pickett* v. *Morris*, 2 *Wash.* 272. as shewing that the verdict and judgment were no obstacle to the relief he claimed. He contended, also, that, as a *common carrier*, *Glassell* had no relief at law, unless he could have proved that the injury to the corn proceeded from the act of God, or of the enemies of the Commonwealth; and that the new evidence offered could not have been admitted at law.

Botts, in reply. The cases of *Turpin* v. *Thomas*, 2 *Hen. & Munf.* 139. and *Morris, Overton and others* v. *Ross*, *ibid.* 408. have settled all the points in this cause, which is not in the least like that of *Pickett* v. *Morris*. The new evidence was in fact of no consequence; for *this particular* corn is proved to have been good when delivered, and to have been injured by the neglect of the captain; and the proof on the other side is only that corn *in general* that year was bad. But even if the evidence was important, it did not *change* the question, but was merely *additional* testimony as to points which had been before the Jury. A Court of Equity will not grant a bill of review to its own decree, on additional evidence to the *same facts*;(1) for, if this were not the case, bills of review would be endless. *A fortiori* then, it should not set aside a judgment at Common Law on such grounds; for the Court of Law which heard all the evidence originally introduced, was more competent to decide as to the effect of the original matter.

The fact that the corn made in 1792 was generally injured, was a circumstance of public notoriety, and might have been known to the complainant before the verdict. If he neglected to make the proper inquiry, it was his own fault, and shewed a want even of ordinary diligence.

Mr. *Randolph's* argument that his client could not have had the benefit of this evidence *at common law*, proves too much; for if it would have been rejected on that ground at the *first trial*, how is he to avail himself of it on the second? But is it not a good defence both in law and equity, that the plaintiff's own default occasioned the injury?

On the *merits*, however, the case is clearly against him; it being fully proved, that the damage arose from the captain's neglect and delay, for which the defendant was responsible.

(1) See 1 *Hen. & Munf.* 180. *Randolph* v. *Randolph's Executors.*

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De Lima v. Glassell's Administrator.

Friday, *November* 17th, the Judges FLEMING and ROANE (Judge TUCKER not sitting in the cause) pronounced their opinions.

Judge ROANE. The grounds on which the new trial was awarded by the Chancellor in this case, were, or might have been, submitted to the Jury in the trial at law. It is stated by the answer of *Stone*, that they were not only submitted and copiously dilated on to the Jury, but also to the Court of Law, on the motion for a new trial, which was refused. It is true, *four* of the Jurors seem to say, that evidence on those points was not submitted at the trial; but supposing such to have been the fact, the appellee ought still to have assigned some reason for not having exhibited his evidence to the Jury; such as that these facts came to his knowledge after the trial, or the like. Nothing of this kind being *shewn*, as the ground of the application to the Court of Equity; this is, therefore, the naked case of moving for a new trial in equity, on grounds which, with ordinary diligence, the party might have availed himself of, on the trial at law; and, therefore, I am for reversing the decree, and dissolving the injunction.

Judge FLEMING. The object of the bill in this case was to obtain a new trial, where the controversy was purely of a *legal* nature, and where a motion for a new trial was overruled by the unanimous opinion of the Court before which the issue was tried, and which heard the whole evidence adduced on both sides. It is a general principle, that a Court of Equity will not interfere in such a case, on the ground that the verdict and judgment at law was erroneous, where neither fraud nor surprise are suggested, nor any supervenient circumstances had arisen. In the case before us, the suit at law in the District Court of *Fredericksburgh* was at issue three years and two months before the cause was tried; which gave the parties full time to collect and produce their tes-

timony; all of which, so far as it respected the state of the vessel and cargo, whilst in *Hampton Road*, and at *Norfolk*, the opinions of the merchants and sea captains as to the danger, and probable fatal consequences that might have ensued, had the brig, with the damaged cargo, proceeded on her voyage, was fairly before the Jury, composed of respectable characters (some of them merchants) in the town of *Fredericksburgh*, where the contracting parties resided. It is a general principle, that the discovery of other evidence is not a good ground for a new trial; which forcibly applies in the case before us, as such an uncommon length of time elapsed between the joining of the issue and the trial of the cause. Perhaps, in some extraordinary cases, the interference of a Court of Equity *on that ground*, might be admitted; but in the present case, the only pretended discovery of new evidence was, that in the year 1792, the crops of corn in many parts of the country were injured by an early frost, and the testimony of some cases of vessels being distressed at sea from having damaged cargoes of grain on board. All this testimony was, or might have been, before the Jury; and it appears from the deposition of *Baylor Hill*, that in the cargo on board the *Janet*, there was a layer of sound, and a layer of damaged corn, alternately; which probably arose from the latter having been received on board in wet or damp weather, (of which it is in evidence there was much whilst the vessel was loading,) and not from any original defect in the corn; which *Spiller*, the manager of Mrs. *Carter's* estate, proved to have been quite sound; and both captain and mate declared it was the best they had ever seen. On these grounds, I concur in the opinion, that the decree awarding a new trial of the action at law, be reversed, and the bill dismissed with costs.

Thursday, Nov. 2d.

Braxton *against* Lee's Heirs.

1. *Affidavits* filed in support of a bill (there being no proof of *notice*) ought not to be considered as testimony in the cause, unless it appear in the record that they were read either by consent of parties, or without opposition when such opposition might have been made.

IN a suit brought in the late High Court of Chancery, by *Elizabeth Braxton*, widow of *Carter Braxton*, deceased, to recover dower in 25,000 acres of land, (of which her said husband had been seised in his demesne as of fee, during the coverture, and to which she had never relinquished her right of dower,) against a number of defendants, among whom were *Sophia Lee* and *William Lee*, *infant* heirs of *Francis Lee*, deceased; the Court appointed *Nancy Lee* guardian, for the purpose of defending them; but it did not appear in the record that she received any notice of that appointment, or appeared either personally or by attorney. No answer was filed on their behalf, neither did it appear that any compulsory process was issued.

2. It should appear that defendants, against whom a decree is entered, had *answered* the bill, or stood out *process of contempt*; and if this be omitted, a bill of review may be filed on the ground of error *upon the face of the decree.*

Commissioners (appointed for that purpose) having laid off and allotted to the complainant her dower in each parcel of land in controversy, and stated their opinion of the annual value of each; the Court, on the 26th day of *March*, 1802, in conformity with their report, decreed (*inter alia*) that the one hundred acres of land in possession of *Nancy Lee*, guardian of *Francis Lee's* heirs or devisees, distinguished in the surveyor's plat by the figure 1. be delivered to the demandant; "and that the said *Nancy Lee*, for her wards, do pay "to the demandant, at the rate of fifty dollars *per an-* "*num*, for rents and profits, from the time when the

3. In a decree against *infants*, *time* should be given them to make objections after attaining their full age.

4. If a bachelor, seised in fee of lands, prior to the year 1760, contracted to sell them, received part or the whole of the purchase-money, delivered possession to the purchaser without making a deed, and, having afterwards married, died in 1797; *quere*, whether his widow (having had *notice before* the marriage of the purchaser's possession) is entitled to dower of such lands?

" original bill was filed, until the demandant shall ob- " tain possession;" the Commissioners having reported the rents and profits of the *whole* three hundred acres in the possession of *Nancy Lee*, guardian as aforesaid, to be worth one hundred and fifty dollars *per annum*.

To this decree, the defendants *William Lee* and *Sophia Lee*, (being yet *infants*,) by *John Dillard* their next friend, presented a bill of review, alleging,

1. That the profits of the land were rated too high by the commissioners;

2. That they had not been defended in the suit; and,

3. That, since the said decree was pronounced, they had discovered that *Ambrose Lee* their grandfather, purchased the said lands of the said *Carter Braxton*, and " they are informed and believe, was let into possession " thereof by the said *Carter Braxton*, *prior* to his in- " termarriage with the said *Elizabeth*, although the deed " conveying the *legal* title *might not* have been made " *until after* the said intermarriage: wherefore they " conceived that the said *Elizabeth Braxton* had no title " to dower in the said land, the same having *of right* " *belonged* to the said *Ambrose Lee* before the said inter- " marriage."

In support of this bill of review, the " depositions" previously taken, of *David Woodrooff*, *Frances Tucker*, *Jacob Scott* and *John Penn* the elder, were *filed* and inserted in the transcript of the record, without setting forth any acknowledgment or proof of *notice*.

The Court, on the 21st day of *March*, 1803, " after " considering *the said bill*," (saying nothing of the depositions,) " and hearing counsel on both sides, rejected " every part thereof, except that part which complained " of an excess in the valuation of annual profits as afore- " said; and, *as to that*, *received* the bill, and directed " execution of a decree, entered on the 12th day of the " same month, in favour of the said *Elizabeth Braxton*

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" against the complainants and their security, on a for-
" feited forthcoming bond; (taken upon a writ of *fieri*
" *facias* in the nature of a writ of *levari facias*,) to be
" suspended as to so much of the money thereby reco-
" vered, as was equal to one third of the said profits;")
from which order, the plaintiffs, by their counsel, prayed an appeal.

The Court of Appeals, on the 17th of *April*, 1805, being " of opinion that the bill of review should not " have been rejected, but that the appellants should have " been allowed to proceed thereon in the ordinary course " to prove the allegations thereof," reversed the said order, and remitted the cause to the Court of Chancery for further proceedings to be had upon the bill of review; whereupon the last-mentioned Court, " altering " its order according to the foregoing opinion," directed the bill of review " to stand as if received for the pur-
" pose of reviewing *every part* of the decree thereby " sought to be reversed;" and *altogether* suspended, until the further order of the Court, the execution of the decree rendered the 12th of *March*, 1803.

Elizabeth Braxton then filed her answer to the bill of review, setting forth that she had *heard* that the complainants had *appeared* and defended the suit by their guardian, who having after appearance failed to answer, and (*as she was informed*) having stood out compulsory process, the Court proceeded to make the decree complained of; that the Commissioners having laid off the 300 acres in *Nancy Lee's* possession, into three equal lots, the respondent, upon a fair allotment, had drawn one of them, and, although the said Commissioners, at the request of *Nancy Lee*, had represented the said lot as more valuable than the other two put together, the Court had confirmed the same to her; since, according to their own representation, this accident could not have been prevented by them; that she was entitled to the benefit of her *good* fortune, as she would have been

compelled to put up with it had it been *bad*. The respondent objected to the testimony exhibited in support of the bill, as consisting of *ex parte affidavits*, of *interested* or apparently *partial* witnesses. And, as to the *time* of *Ambrose Lee's* purchase, she relied on an account of *William Cabell*, jun. against *Carter Braxton*, to show that the said *Ambrose* was alive on the 9th of *October*, 1762, and that a survey of the land which *he* purchased of *Carter Braxton*, was *then* made for *him;* that the date of the said *Carter Braxton's* birth appeared, from an inscription on a tomb-stone erected by his father (the patentee of the land in question) over the body of his mother, to have been the 10th of *September*, 1736, which would scarcely have left time for him to sell land to *Ambrose Lee*, after he came to full age in the year 1757; circumstances which, when connected with the date of the deed for the land in question, from *Carter Braxton* to *Francis Lee*, son of *Ambrose*, (which was *May* 3d, 1765,) "rendered all the allegations, in the bill, suggest-" ing error, improbable." This part of the answer seems intended to counteract the *ex parte* "deposition" or "affidavit" of *Frances Tucker*, late *Frances Lee*, widow of the said *Ambrose Lee*, which stated that he purchased the land of *Carter Braxton* in the *summer of* 1757.

The deposition of *David Woodroof*, taken after the answer was filed, proved "that *Ambrose Lee* acted as "overseer or steward for *Carter Braxton*, prior to the "year 1760, and some years after; that he resided on "the said *Braxton's* land, and purchased land of him at "different times; and that the land on which Mrs. "*Nancy Shields* (late *Nancy Lee*) now resides, is a part "of the first purchase, *which was made prior to the* "*year* 1760; but the witness did not know when the "said land was paid for, nor when the deed for it was "made."

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It had been proved by evidence filed in the original suit, that Mrs. *Braxton's* marriage with *Carter Braxton*, took place the 15th of *May*, 1760. The account in the hand-writing of *William Cabell*, jun. (who was dead,) was authenticated by the deposition of *James Penn*; and the inscription on the tomb-stone by that of *Richard Brooke*. The deed from *Carter Braxton* to *Frances Lee*, dated *May* 3d, 1765, "in consideration of the sum of forty pounds paid by the late *Ambrose Lee*," conveyed to the said *Frances Lee*, "a tract or parcel of land containing "two hundred acres, being part of a tract of thirteen "hundred and seventy acres, which the late *Ambrose* "*Lee* purchased of the said *Carter Braxton*;" (without saying at what time;) "reserving to *Frances Lee*, wi- "dow and relict of *Ambrose Lee*, deceased, the uses of the "abovementioned tract of land during her natural life "or widowhood."

This cause came on to be heard on the 20th of *September*, 1806, before the present Judge of the Superior Court of Chancery for the *Richmond* District, who thereupon decided, "that so much of the decree pro- "nounced the 26th of *March*, 1802, as relates to the "present plaintiffs, be reversed; that the decree of the "12th of *March*, 1803, upon the forfeited forthcoming "bond, be also reversed; and that the defendant pay to "the plaintiffs the costs by them expended in prosecu- "ting this suit:" from which decree the defendant appealed to this court.

Warden, for the appellant, made three points: 1. That the affidavits filed in support of the bill of review, ought not to be considered as testimony in the cause; there being no proof of notice; and it not appearing from the record that the Chancellor had permitted them to be read;

2. If this were otherwise, the report of the Commissioners was in all respects entitled to higher credit; and,

3. That *Carter Braxton's* seisin of the absolute *legal* estate at the time of the marriage being proved, and no conveyance thereof having been made by him until afterwards, the appellant was certainly entitled to dower. As in the case of *Claiborne and wife* v. *Henderson*,(a) it was decided that, before the act of 1785, a widow was not dowable where the husband had held only the *equitable* estate, (having no deed, though in possession of the land,) it would be hard that she should not have dower where the legal estate remained in him until after the marriage.

(a) 3 *Hen. & Munf.* 322.

Judge ROANE suggested a point, whether advantage could be taken of *any* error in the process or proceedings previous to the decree, upon a bill of review for error *upon the face of the decree*, and referred to *Quarrier* v. *Carter's Representatives*.(b)

(b) *Ante*, p. 242.

Randolph, for the appellees. It should appear from the proceedings, that the *answer* was filed; and *this* should be considered as part of the decree. If there was no answer, there should have been process of contempt; and, to shew this, the burthen of proof lies on the other side.

But, even if an answer had been filed, the decree should have given the infants leave to open the cause at a future day, the answer of a *guardian* being of no consequence.

On the *merits*, on that branch of the question which relates to the discovery of *new* matter, the original decree was pronounced on the principle that *Braxton sold the land after* the marriage: the bill of review was on the ground that he had sold it, and put *Ambrose Lee* in possession *before* the marriage, though the *deed* was not made until after the marriage; which allegation is fully proved by the testimony of *David Woodroof*.

Such being the case, the question resolves itself to this: if a bachelor, seised in fee of lands prior to the

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year 1760, contracted to sell them, received part of the purchase-money, delivered possession to the purchaser without making a deed, and, having afterwards married, made a deed during the coverture, and died in 1797; whether his widow, having had notice of the purchaser's possession before the marriage, is entitled to dower of such lands?

The question, thus stated, was argued at some length by *Randolph against*, and *Warden in favour of, the widow;* but, for the sake of brevity, this argument is omitted, the Court having been of opinion that the *facts* presented by the evidence did not render the point necessary to be decided in this case.

Saturday, Nov. 11. The Judges TUCKER and ROANE pronounced their opinions; Judge FLEMING being absent through indisposition.

Judge TUCKER. Mrs. *Braxton* brought a bill against several persons, and, among others, the appellants, for dower, and obtained an absolute decree against them, without any plea or answer in their behalf, by their mother, who was appointed guardian *ad litem*, but who is neither shewn to have appeared, or to have been served with notice of that order, neither was there any decree *nisi*, or notice of such a decree against these defendants or their guardian, to be discovered in the record, in the original suit. Afterwards, they brought a bill of review by their next friend, and assigned the following reasons for setting aside that decree: *First*, that the yearly profits of the dower lands were rated too high by the Commissioners appointed by the Court to value the same; *secondly*, that they were not defended in the suit; and, *thirdly*, "that they have discovered since the said "decree was pronounced, that *A. Lee*, their grandfather, "purchased the lands in question of *Carter Braxton*, and, "they are informed and believe, was let into poses-

"sion thereof by the said *Carter Braxton*, *prior* to "his marriage with the complainant *Elizabeth*, although "the deed conveying the legal title *might* not have been "made until after the marriage; wherefore they conceive "that she has no title to dower in the lands, which, in "equity, belonged to another before her marriage with "the said *Carter Braxton*."

As to the first of the points, there is no proof in the record, that I can discover, that the lands were estimated too high by the Commissioners. But, inasmuch as the bill against them was not regularly taken for confessed, nor any decree *nisi* in the cause either served upon them, or their guardian appointed by the Court to defend them in that suit, nor does any such decree appear to have been ever made in the cause, as to them or their guardian, nor any proof that the person so appointed guardian, either had notice of such appointment, or voluntarily appeared to defend the suit, nor that any day was given to the infants to shew cause against the decree when they should respectively come of age, I think the decree, as to them, was not only erroneous, but absolutely void; and, consequently, the decree of the Chancellor; reversing that decree upon this bill of review, as to those defendants, is so far perfectly correct.

As to the abstract question which was argued, whether, if a man seised of lands in fee-simple, aliene the same for a valuable consideration, and *gives* the purchaser possession of them, and then marries, and then executes a conveyance for the lands; whether, in this case the wife shall not be barred of her dower in a Court of Equity? It is, I conceive, not necessary to decide it at present. Cases may be put, which I think would operate as a bar of dower. As if a man, seised of lands in fee-simple, should marry a woman *privately*, and then, with her privity and consent, sell his lands for a valuable consideration, and execute a conveyance for them to the purchaser, and die, and then the wife should demand dower of the lands so aliened, and shew that the same was

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done after her marriage; yet in that case she ought to be barred by reason of the fraud and covin on her part, as well as on the part of the husband; and this, notwithstanding she might have been an *infant* as well as a *feme covert* at the time of the alienation. For *covin* and *consent*, as Sir *Edward Coke* expresses it, in such a case should *suffocate* the right which appertained to her, and the wrongful manner avoid the matter that is lawful;(a) and this at common law as well as in equity.

(a) Co. *Litt.* 85. a. 357. a. *Litt. sect.* 678.

But the record before us presents no such case. The suggestions in the bill are extremely vague, and the evidence of *David Woodroof*, the only witness to that point, (for I throw the affidavits taken before the bill filed, out of the question,) is equally so. If the fact were, that *Lee* purchased as early as the year 1757, and that he continued in *Braxton's* employ as his steward, residing upon the principality in extent, which *Braxton* held in a remote county, and made purchases from him from time to time, without demanding conveyances for the lands so purchased, the charge of covin and concealment might, perhaps, be retorted upon him. At least, such *laches* on his part, would afford a strong argument in favour of Mrs. *Braxton's* claim to her dower. Besides, the clause of warranty in *Braxton's* deed, was probably intended to afford a compensation to *Lee* from *Braxton's* heirs, in case his wife should survive him and demand her dower of these lands. And such a warranty was at that time an ample security for such compensation; as *Braxton* had more than twenty times as much land in the tract upon which *Lee* resided as his steward. Having accepted the warranty under such circumstances, I think he ought not to be let in to defeat the legal rights of the widow, but left to his remedy against the heirs of Mr. *Braxton*, upon the warranty.

The whole merits of the case being brought before the Chancellor by the bill of review, and the defendant's answer thereunto, and the cause being equally open as up-

on a rehearing,(a) I think the Chancellor ought to have decreed to the complainant in the original suit, her dower in the lands of the complainants in the bill of review, to be assigned to her by Commissioners for that purpose to be appointed, and a valuation of the annual rents and profits thereof to be made by them, from the —— day of *June*, 1800, when the original bill was filed against the present appellants; and to be paid to the present appellee by the appellants or their guardian, unless the parties, to avoid the expense of such Commissioners, should agree to the former report, survey, and allotment, in the original suit; or should agree to make a new allotment only, without any other report or survey.

(a) 1 *Atk.* 290. *Catterall* v. *Purchase.*

A regular consequence of the preceding opinion is, that the decree upon the forfeited forthcoming bond, taken upon a writ of *fieri facias*, sued out in behalf of the appellant, against the appellees, on the first mentioned decree, ought to remain as a security, so far as it will extend, for the payments of the rents, issues, and profits, which may be awarded to the appellant in pursuance of the decree now to be made, and her costs of suit: and, therefore, that the decree, reversing that decree with costs, is erroneous, and ought to be reversed, and the cause sent back, with directions to be proceeded in according to the principles in the decree now to be made.

Judge ROANE. The decree of the 26th of *March*, 1802, is erroneous, so far as it relates to the present appellees, in this, that no day is given them, being infants, to shew cause against the same, after they shall have attained their age. It is also erroneous in this, that the decree was rendered without any answer being filed on the part of the appellees, nor was the bill regularly taken for confessed as to them: and both these errors are

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to be considered as errors apparent on the face of the decree itself.

For this cause, then, and not on the ground of new matter, or of an excessive allowance for profits, (admitting the cause to have been regularly heard,) the bill of review was rightly ordered to be received by this Court. This ground of error went to the *whole* decree; and, therefore, the Chancellor's *partial* allowance of the bill was erroneous. From a note I have of the case when it was formerly before the Court, *this* was the real ground on which the bill of review was directed to be received; though the Chancellor might have been misled in this particular, by the transcript of the judgment of this Court, it stating, (after having said that the bill should not have been rejected,) that "the appellants should "have been permitted, in the ordinary course, to prove "the allegations thereof;" whence it might be inferred, that the bill was allowed by this Court on the *merits*.

If, upon those merits, the cause were now in *favour* of the appellees, although it was not regularly proceeded in as to them, the decree of reversal ought, perhaps, to be simply confirmed, and the cause entirely ended: and this brings us to consider those merits. As to the allowance of *profits* by the Commissioners, they state that the one third of the land which fell to the widow, was superior in value to the other two thirds of the tract: they regret this, and submit it to the consideration of the Court; but, perhaps, the Court can find no remedy therefor, inasmuch as the law seems to require that, in dower, the land is to be divided into three equal parts, and then allotted; which was done in this case. The profits of the whole land are estimated by the Commissioners at 150 dollars *per annum*; and, certainly, therefore, fifty dollars are not an extravagant allowance for *this* third. The proofs, too, by the appellees' witnesses, only reduce the value, severally, according to

the opinions of the witnesses, to forty and forty-five dollars *per annum*. If, therefore, the decree had been regular in other respects, no objection would lie to it on account of an excessive allowance for profits.

With respect to the *new* matter; it is said to have been discovered since the former decree, that *Ambrose Lee* purchased, and was put into possession of the lands in question, prior to Mr. *Braxton's* marriage; but the allegation goes on to *admit* that the deeds might not have been made from *Braxton* to *Lee*, until *after* the marriage. This allegation is therefore a complete *felo de se*, unless this sale and possession were known to Mrs. *Braxton* at the time of the marriage, (which is not charged in the bill, nor proved,) and unless Mr. *Randolph* is also correct in placing purchasers by marriage on the same footing, in equity, in this respect, with other subsequent purchasers with notice. This is a very important question; but the facts in the present case do not make its decision absolutely necessary. I have found no cases placing a wife on a common footing with other purchasers with notice. So many considerations superior to that of *interest*, combine together with it, in relation to marriages, that I think it at least doubtful whether the ordinary doctrines with respect to *money purchasers* will apply also to the case of *marriage*. It seems unreasonable to require the wife, in the language of those cases, as soon as an adverse title is discovered, to stop her hand from completing the marriage, especially after the affections are engaged: on this point, however, I give no conclusive opinion.

But, admitting for the present, that a wife stands on the same footing with other subsequent purchasers, let us test this case by the ground on which such purchasers are postponed in equity to prior purchasers who have not a *legal* title. In the case of *Le Neve* v. *Le Neve*,(*a*) it is said that the intent of the registration act being to secure subsequent purchasers against *secret* con-

(*a*) 3 *Atk.* 646.

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veyances, a subsequent purchaser shall be postponed to a prior unregistered deed, if he had *notice* thereof; for that then he could not be prejudiced. This clear principle of equity will run through, and apply to every analogous case: and, accordingly, it is applied in the same act to the statute of enrolments of 27 *Hen.* VIII. which is pretty similar to our act of 1710; in short, it is applied to a case which is precisely the case at bar, if the wife is to be considered merely in the light of a subsequent bargainee for money. In that case it is held, that such subsequent bargainee shall be affected with *notice* of a prior right, in the same manner as if the prior purchaser had been by *feoffment* with livery of seisin. The ground on which these decisions go, (both on the acts of registration and enrolment,) is that, "although "the subsequent purchaser has the *legal* estate, he is "yet left open to any equity which a prior purchaser "may have, and is postponed, because, having notice, he "might have stopped his hand from proceeding.(a)

(a) 3 *Atk.* 646.

The ground, more particularly, on which this postponement takes place is, that the taking the legal estate after notice of a prior purchase, makes the party a *mala fide* purchaser; that it is a *fraud*, and a species of *dolus malus*; and that it is a *machinatio ad circumveniendum*.(b)

(b) *Ibid.*

But when fraud and an unjustifiable machination is to be imputed, the proof of *notice* must be clear: and, accordingly, it is held in *Hinc* v. *Dodd*,(c) that "a mere "*suspicion* of notice" is not sufficient to induce the Court to break in upon an act of parliament; and that there must be clear and undoubted notice, to be a proper ground of relief.

(c) 2 *Atk.* 276.

In the case before us, independently of its not being charged or shewn that Mrs. *Braxton* knew of the sale to, or possession by, *Ambrose Lee*, that possession, at most, was very equivocal: it was, at most, but "a mere suspicion of notice." It was of a piece of *wood land* connected with a larger tract, of which it was originally part, and

holden by a steward, who also held the whole tract; and therefore his possession did not afford that clear *indicium* of property, which results from a separate, exclusive possession of a distinct and separate tract of land.

This case, therefore, is deficient in facts whereon to oust Mrs. *Bracton* in equity of her *legal* title to dower; even admitting that, in general, she is to be considered as an ordinary purchaser for money.

Upon the whole, my opinion is, that the decree now before us is correct in reversing the decree of *March* 6th, 1802, and the decree of *March* 12th, 1803, founded thereon; but that, the reversal being justified in part on the ground that the original decree was rendered without the cause being properly matured for hearing as to these appellees, the decree before us is erroneous in not having further provided for a regular procedure against them from the bill upwards; which being done, the cause would come on regularly to be tried on the merits: therefore, reversing the decree on this ground only, I am of opinion, that the cause be remanded for further proceedings from the bill, as amended, so as to make the appellees parties; and that the appellees should recover their costs, as the party substantially prevailing.

The following was entered as the opinion of the Court, viz. "that there is no error in the said decree of the "Superior Court of Chancery, reversing so much of the "decree of the 26th of *March*, 1802, as relates to the "present appellees, and the decree of the 12th of *March*, "1803, founded thereon; the said first mentioned de-"cree having neither allowed the appellees (being *in-*"*fants*) a day to shew cause against the same after they "attained their age, nor was grounded upon any an-"swer of the appellees by their guardian or next friend, "regularly exhibited, nor, in default thereof, was the bill "as to them decreed to be taken for confessed: but that "the said decree is erroneous in not setting aside all

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"the proceedings in the said cause, as relative to the "present appellees, subsequent to the bill, and provi- "ding that the cause should be regularly matured for "trial on the merits, but instead thereof, barring the pre- "sent appellant from a recovery to which she may be "justly entitled: therefore, it is decreed and ordered, "that the said decree be affirmed as far as it goes, and "that the appellant pay to the appellees, as the parties "substantially prevailing in this Court, their costs by "them about their defence in this behalf expended. "And this Court, proceeding to make such decree "as the said Superior Court of Chancery ought to have "made, doth further decree and order, that all the pro- "ceedings in the cause, in which the decree of the 26th "of *March*, 1802, was rendered, be set aside, subsequent "to the amended bill by which the appellees were made "parties, so far as they relate to the present appellees; "and that the cause be regularly proceeded in and ma- "tured for a hearing by the said Superior Court of "Chancery, in order to a just decision upon the merits; "for which purpose the cause aforesaid is remanded to "the said Superior Court of Chancery."

November, 1809.

Yancey *against* Lewis.

Where a purchaser comes into a Court of Equity for relief against a judgment at law, on the ground of a defect in the vendor's title to part of the tract of land purchased, it is not enough for him to *allege* such defect or want of title: he must *prove* an actual eviction, or superior title in some other person.

THIS was an appeal from a decree of the Superior Court of Chancery for the *Staunton* district, reversing a decree of the County Court of *Rockingham*.

Layton Yancey obtained an injunction from the County Court of *Rockingham*, to be relieved from a judgment

at law, recovered against him in that Court, by *Lewis*. The material facts were these: *Lewis* sold to *Yancey* a tract of land, with general warranty, by certain metes and bounds, which were thought to be the true boundaries by both parties. They had long been in treaty for the land; a considerable degree of anxiety was manifested by *Yancey* to possess it; *Lewis* always wishing to sell *by the acre*, and *Yancey* to purchase *in gross*. At length a bargain was concluded, by which *Yancey* was to pay *Lewis* 500*l.* for the land included within certain specified lines, without mentioning the quantity, or the price, per acre. All the payments were made except the last; when *Yancey* filed a bill to be relieved from a judgment recovered for the sum due, on the ground, that about one hundred acres of the land within the specified boundaries, were waste and unappropriated; that an entry had been made by *John Yancey*, a brother of the complainant, and a grant obtained; but that grant was not produced, neither was there any *proof* of an *actual eviction*, nor of a superior title to that of *Lewis*, in any other person, though it was *alleged* that it existed.

It is neither charged in the bill, nor is there any evidence of fraud or concealment on the part of *Lewis*. He appears to have been ignorant that the title was incomplete; the papers concerning which were returned to the register's office before his father's death, though the time for the emanation of a patent had not elapsed. *Yancey* had married his sister, was left executor of his father's estate, and guardian to the infant children, of whom *Lewis* was one. The land in controversy was devised to *Lewis*, by the will of his father; and, as he states in his answer, *Yancey*, from his relation to the family, and his agency in the affairs of the estate, was better acquainted with the title papers than he was, and actually commenced the treaty for the purchase of it, before *he* was of age. *Yancey's* anxiety to possess the land was so great, that

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when *Lewis* was only about seventeen or eighteen years old, he made application to him, to promise and engage to sell him the land when he should attain his full age, using many powerful arguments to induce him to do it; such as having lent him (*Lewis*) money during his minority, which would have been lost had he died under age; and, finally, that unless he (*Yancey*) could get the land, he should be compelled to remove, with the *sister* of *Lewis*, to some other part of the country; his tract of land being too small for the accommodation of his family.

Various *circumstances* were relied on by the appellee, (to prove that *Yancey* had, or ought to have had, a more accurate knowledge of the situation and boundaries of the land than the appellee himself possessed,) which are minutely detailed in the opinion of Judge TUCKER, and therefore need not be repeated.

The County Court of *Rockingham* perpetuated the injunction; but on an appeal taken by *Lewis*, to the Superior Court of Chancery for the *Staunton* district, it was dissolved, and the bill dismissed: whereupon *Yancey* appealed to this Court.

Call, for the appellant, argued, that as the language of the deed from *Lewis* to *Yancey* was explicit, in conveying the land by certain metes and bounds, *Lewis* ought not to be received to say, that he meant to sell any less quantity. This would, in effect, be to substitute parol testimony to contradict the plain words of a deed.

There is no circumstance, said Mr. *Call*, from which fraud on the part of *Yancey* could even be inferred; much less is there any proof of it. The allegations of the answer not being responsive to the bill, are not evidence; and they are not supported by a single deposition.

Randolph and *Wirt*, for the appellee, contended, that *Yancey*, being a plaintiff in Chancery, was bound to shew every thing stated in his bill, or it should be dismissed. The *gist* of *Yancey's* complaint was, that by a paramount title, he had lost 130 acres of the land bought of *Lewis*. This is alleged to be in 130 acres acquired by *John Yancey*; but there is no *proof* of the existence of a superior title in *John Yancey*, or in any other person. Nothing but actual *eviction* should entitle the appellant to the final relief which he now asks.

Suppose this Court should act on the principle that *Layton Yancey* had lost the land by *John Yancey's* paramount title, and afterwards *John Yancey's* title should be tested and found *against him*, will not *Layton Yancey* thus get his injunction perpetuated, and the land also? But, if the Court would not require a sentence of actual *eviction*, surely they will require *some proof* of *John Yancey's* title; which has not been shewn. But, in fact, the defective title complained of does not exist.

On the *circumstances*, they contended, *Layton Yancey* was not entitled to relief. In three months after the works were returned to the register's office, he became proprietor of all the papers, by being executor of the appellee's father, and guardian to the infant children, of whom the appellee was one. If, then, there were any neglect in perfecting the title, it was imputable to the appellant alone.

Again, the deed from *Lewis* to *Yancey*, was founded on the statement of *Yancey himself*, who had all the title papers, and the best opportunity of knowing the situation of the land.

Another circumstance ought to have great weight. The location on part of this tract, was made by *John Yancey*, a brother of the appellant, partly by a warrant furnished by the appellant himself, who appears to have

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been officious in taking the papers from the surveyor, and carrying them to the office, in order to perfect the title.

Judge TUCKER. The object of the appellant's bill of injunction, was to be relieved against a judgment at law on a bond given in part of the purchase of a tract of land sold to him by the appellee, with warranty, by certain metes and bounds in the deed expressed, within which there was a deficiency of about one hundred acres, for which the appellee had not obtained a patent, though apparently entitled to one under the will of his father, whose title to a patent for the same, as far as appears to the contrary, was, as far as depended upon him, complete at the time of his death, though the six months required by law for a survey to remain in the office, had not then elapsed.

The father of the appellee, in his will, makes mention of his leaving both patented and unpatented lands, constitutes the appellant his executor, and expresses his peculiar confidence in him in the management of the trust reposed in him, and in the *peculiar* care he hopes he will take of his younger children, to whom he most earnestly recommends them.

There is no charge, neither is there any proof of fraud, imposition, or concealment, at the time of the bargain, (which appears to have been many years in contemplation of the *appellant*,) at least, on the part of the *appellee*. The desire of the latter to sell *by the acre*, and the former to purchase *in gross*, are circumstances which tend to confirm the idea, that the transaction on the part of the appellee was perfectly fair and unimpeachable; and that he was perfectly ignorant that he had not a *legal* title to that part of the lands for which his father had taken all necessary steps to obtain a patent in his life-time, and probably was prevented from so doing, only by his death. Whether the appel-

lant was equally ignorant, is not altogether so clear to my mind. The trust reposed in him creates a presumption that he might, perhaps *ought*, to have informed himself of circumstances which regarded the interest of his testator's estate, and his children committed to his care. The contiguity of his own land to that which he sought to purchase, and his having been present at a survey thereof, made by his testator's direction in his life-time, strengthen this presumption. His locating the spot; then withdrawing his location, and suffering it to run out of date; succeeded by the location of his *brother* on the part of his *own* warrant, connected with this bill of injunction, are all circumstances which bear a *suspicious* aspect at the least. The rejection of the appellee's offer to rescind the contract upon being paid the money he had received, is by no means calculated to dissipate or repel these grounds of suspicion. And if he did indeed declare that he would not take more than double the money he was to give for the whole, at the very time he was complaining of the deficiency, it must be admitted that he was more willing to *ask*, than to *do* equity. It is unnecessary to decide whether all these circumstances taken together, ought not to preponderate against his claim for relief; because he has, in fact, *shewn no eviction, nor any superior title in any other person.* The appellee's title against the Commonwealth, for any thing appearing on this record, is indisputable, and requires nothing but the actual emanation of a patent to render it complete, both at law, and in equity. No entry or location made subsequent to the death of his father, can affect it, unless for some cause for which a *caveat* might have been entered. Nothing of the kind is even *alleged*, much less *proved*. *John Yancey's* location, if actually made, (which certainly does not appear in such manner in the record as to be available,) does not appear to have been perfected or proceeded upon. I therefore

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think the Chancellor's decree, dismissing the bill of injunction, ought to be affirmed.

Judge ROANE concurred in affirming the decree of the Superior Court of Chancery.

Judge FLEMING also concurred.

By the whole Court, the decree of the Superior Court of Chancery for the *Staunton* district AFFIRMED.

END OF OCTOBER TERM.

SELECT CASES

RELATING CHIEFLY TO

POINTS OF PRACTICE,

DECIDED BY THE

SUPERIOR COURT OF CHANCERY,

FOR THE

RICHMOND DISTRICT.

IN THE 32d AND 33d YEARS OF THE COMMONWEALTH.

CREED TAYLOR, Esq. *Chancellor.*

Dangerfield *against* Claiborne and others.

June term, 1808.

THIS case was argued at *February* term, and the Court took time to consider of it. Early in this term it was decided, and the bill dismissed. In the month of *May* last, the plaintiffs obtained a commission from the clerk, to take depositions, and since the decree was pronounced, two depositions have been taken, and Mr. *Taylor*, counsel for the plaintiffs, in accounting for this testimony, and in speaking of the advice he had given to his clients before the last term, said, "exertions to "find witnesses who could prove *Herbert Claiborne's* "agency for *Harrison*, were immediately used, and, just "as they were believed to be unavailing, accident threw "one of my clients, at a *horse-race*, in the way of the "witness, whose deposition has been recently taken;" whereupon the plaintiffs moved to set aside the decree, and to continue the cause until the next term.

1. Depositions taken *after the argument* of the cause, (without special order,) *suppressed.*
2. Exposition of the rule of Court as to taking depositions after the cause is set for hearing.

JUNE, 1808.

Daugerfield v. Claiborne and others.

By the Chancellor. How long this case has been in Court, I do not know; but I know, that ever since the commencement of my time upon the bench, it has been regularly continued for the plaintiffs, for some cause or other. I shall not say any thing about the conduct of any person concerned in this case; but the testimony is presented under circumstances that are suspicious, and dangerous to the justice of the country.

The commission ought not to have been asked for, (after the cause was in my hands,) but in *Court;* and ought not to have been issued in *vacation* by the clerk; but I do not blame him, nor the counsel. Formerly, after a cause was set for hearing upon a publication of depositions, no commission could then be issued, to examine other witnesses without leave of the Court, to *enlarge* the rule of publication. The statute regulating the practice of this Court, says, (1 *Rev. Code*, 67. s. 46.) "whenever a general commission shall issue for taking "depositions upon answer and replication, six months "from the time of the replication shall be allowed the "parties, for taking their depositions, and either party, "at the expiration of the said six months, may set the "same for hearing; nor shall any deposition taken after "that time be read as evidence on the hearing, except "the same was taken by *consent* of the parties, by *special* "order of Court, or out of the State." This law produced so many applications to the Court, for *special* orders, that it became as inconvenient to counsel as it was expensive to suitors; and therefore the Court made a standing rule, that commissions to take depositions may issue at any time, after the cause, in which they may be required, is set for hearing, without any application to the Court for that purpose. This was done under an impression, that the true intent and meaning of the act,

would be preserved in the practice of the Court, counsel relieved from great inconveniences, and suitors from very great expense; and, more especially, as exceptions to the reading of such depositions may be made at any time before the hearing of the cause; but it never was supposed by me, that, under any practice, a commission would be asked for, *after the argument* of a cause, but in *Court*; and in no such case should it be issued, but by special order of the Court, made upon the *affidavit* of the party; but, since no such application was made to the Court in this case, the depositions ought not to be received, but upon such an *affidavit* of the party, as would have entitled him to a commission by special order of the Court, which, *at this time*, would be a very great favour. The rule of the Court in future will be understood, as authorizing commissions to either party between the first *publication*, and the *trial* of the case, but not afterwards. (*Vid. Anonymous* case, *post*, 401.) The Court should act with very great caution in awarding commissions after an argument: it should most clearly appear, by affidavit, or otherwise, that the commission was required by the justice of the case, and that the party was not guilty of any *laches*, which he could have controlled: but to receive testimony, taken without any of those solemnities, and before unknown to the party, who accidentally discovered it at a *horse-race*, would be to establish a rule, to invite men to the *subornation of perjury*, with very great certainty of success, as no attempt would be made, without a full knowledge of the point to be established, which is not generally the case before a cause has been decided. Again, every rule that takes us from a cross-examination of the witnesses in Court, and substitutes their depositions from a distance, should be guarded, at least, with the strictness of the law; and the act before referred to is

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positive, that such testimony shall not be read, and this Court is as much bound by the law, as any other Court.

The depositions cannot be received.

Hodges *against* Davis.

A cause may be *reheard*, upon a *petition* presented before the term has passed in which the *final* decree was pronounced; but not afterwards, except by *bill of review*.

UPON an appeal from *Campbell* County Court.

In this case, a *final* decree was entered at the last term: and, at this term, *Stuart*, counsel for the appellee, moved for a *rehearing* of the cause, upon a *petition* for that purpose; and relied upon the *British* cases of *Baxter* v. *Wilson*,(*a*) and *Buck* v. *Fawcett*.(*b*) He also quoted 3 *Tuck. Blacks.* 453, 454.

(*a*) 2 *Atk.* 152.
(*b*) 3 *P. Wms.* 242.

By the Chancellor. The practice, *in England*, is as well settled, that after a *final* decree is *signed* and *enrolled*, the cause cannot be *reheard* but by a *bill of review*, as it is, *in this country*, that after a *final* decree, and the term in which it was pronounced has passed, it cannot be *reheard*, but in like manner. The cases relied upon unquestionably support this doctrine, that until a decree is *signed* and *enrolled*, the cause may be reheard by *petition*; but after it has been *signed* and *enrolled*, it must, if *reheard*, be by *bill of review*; and so it must here *after a final* decree, and the term has passed in which such decree was pronounced.(*c*)

(*c*) *Barnett* v. *Young*, in the Court of Appeals. MS. *April*, 1804.

Motion for a rehearing by *petition* denied.(1)

(1) So a *bill of review* does not lie until after a *final* decree. *Banks* v. *Anderson*, 1 *H. & M.* 20. *Bowyer, &c.* v. *Lewis*, *Ibid.* 553. The decision in *Green* v. *Clark*, in the Court of Chancery, *March* term, 1807, (not reported,) was to the same effect.

Foster *against* Sutton.

June term, 1808.

UPON calling this case, Mr. *Wickham* stated that he had an objection to make to the reading of some of the depositions taken without due notice. To this Mr. *Randolph* (in favour of whose client the depositions objected to had been taken) said, the objection came too late, as he understood the rule of the Court. Mr. *Wickham* replied that the depositions had been taken under a commission issued since the cause was set for hearing; and that, under the rule of the Court, exceptions to the reading of such depositions may be made at any time before the hearing of the cause.(*a*)

Exceptions to the reading of depositions, taken by virtue of commissions issued after the cause in which they may be required is set for hearing, may be made at any time before the cause is *gone into, when called*; after which such exceptions would come too late.

(*a*) See the 12th Rule of Practice, 1 *H. & M.* vi.

By the Chancellor. The depositions objected to have been taken under the 12th rule of the Court, which has been correctly stated by Mr. *Wickham*, and the exception taken in due time, as the cause is not gone into; after which it would come too late.

Mr. *Randolph* agreed not to rely on the depositions, and the cause was tried.

Anonymous.

June term, 1808.

BY the Chancellor. A *scire facias* to revive a suit in this Court, which abates by the death of either party, must be *served* "by the *sheriff* or other *officer* to whom "the same is directed;" the service thereof by a *private* individual, though proved by affidavit, not being sufficient.(*a*)

In what manner a *scire facias* to revive a suit in Chancery must be served.

(*a*) *Rev. Code*, vol. 1. p. 379. c. 231. *Ibid.* p. 66. c. 64. s. 25.

June term, 1808.

Spencer *against* Carter.

The 2d section of the act of *February* 1st, 1808, "concerning the sale of property under executions and encumbrances," applied to all sales made after the said act commenced and was in force, under *any* decree in Chancery, whether such *decree* was dated before that time or after.

A valuation, by Commissioners legally appointed, of property decreed to be sold, ought not to be set aside for the purpose of producing a sale, unless it appear that they clearly acted under a *mistake*, or were influenced by some *misconduct* of the party interested to prevent such sale.

(*a*) *Rev. Code*, vol. 2. p. 156. c. 123.

IN this case, at *June* term, 1808, the Commissioner appointed by the decree of this Court to make sale of the mortgaged land in the bill mentioned, (which decree bore date on the 27th day of *February*, 1808,) made a report that he had advertised the same, and, on the day appointed for the sale thereof, the Commissioners for the city of *Richmond* (where the land lay) attended, agreeably to the act of the general assembly, entitled, "an act concerning the sale of property under executions "and encumbrances," (which passed on the 1st of *February*, and took effect on the 1st of *March*, 1808,) and valued the same to two thousand pounds. That the plaintiff bid three thousand dollars only; and, whether this sum was sufficient to entitle the plaintiff to the property under the provisions of the said act, or not, was what the Commissioner declined to determine, and, by his report, submitted to the decision of the Court.

By the Chancellor. The second section of the act above mentioned(*a*) applies to all *sales to be made after the said act commenced and was in force*, by Commissioners, under *any* decree of a Court of Chancery, to satisfy any claim whatsoever, and to all sales *under any deed of trust executed posterior to that time*, but not to sales *under such deeds executed anterior thereto.*

Sale set aside, and the Commissioner directed to proceed to execute the decree, subject to the provisions of that act.

At *September* term, 1808, the Commissioners, who, as above mentioned, had valued the mortgaged property to 2,000*l.* stated to the Court that one of them, at that time, thought the valuation too high; another thought the property was better improved than it afterwards appear-

ed to be; and the other changed his opinion upon talking with the plaintiff and some others, about the value of it. And now Mr. *Warden* moved to set aside that valuation, that the property might be valued to so much less as might produce a sale.

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By the Chancellor. When the Commissioners valued the property in question, they were together, and in presence of the parties upon the premises; and, if not informed of the actual improvements, they might have been without any difficulty, and with but little trouble, as the property consisted of a lot and its improvements, on the main street in this city. But, since that time, they have separated, and the property cannot be sold; and they have become dissatisfied with their former valuation; not in the presence of the parties, but upon an interview with the plaintiff. But, unless it could be shewn to the satisfaction of the Court that they clearly acted under a *mistake*, or were influenced by the *misconduct* of the defendant, in fixing the valuation at 2,000*l*, the Court should not interpose.

Motion to set aside the valuation denied.

Horton *against* Horton.

September term, 1808.

IN *March*, 1805, a decree was pronounced in this case. The defendant was out of the Commonwealth at that time; and, of course, under the 4th section of the

An attachment to enforce a decree pronounced against a person who was out of the Commonwealth, cannot be awarded against him after his return, until twelve months have elapsed from the time of service of a copy of such decree.

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Horton v. Horton.

act directing the method of proceeding against absent defendants, (1 *Rev. Code*, p. 115.) he was entitled to the term of seven years to appear and petition for a rehearing. Some time in the present year he returned, and appeared openly; and, on the 19th of *August* last, was served with a copy of the decree, which was not complied with; and thereupon the plaintiff moved for an attachment.

By the Chancellor, By the 4th section of the act directing the method of proceeding in cases like the present, it is clearly stated that the defendant may, within twelve months after the service of the decree, appear in Court, and petition to have the cause *reheard*; and therefore should not be attached until the expiration of that time.

Attachment denied.

September term, 1808.

Purcell *against* Richardson.

An execution directed to the *sheriff* of —— may be executed by the *serjeant* of a corporate town.

IN this case, the defendant had issued an execution against the body of the plaintiff, upon a decree of this Court, directed to the *sheriff* of ——, and it was *duly* returned executed by the *serjeant* of the city of *Richmond*. And now Mr *Warden*, on behalf of the plaintiff, moved to quash the execution and the return, because the execution was executed by an officer to whom it was not directed.

By the Chancellor. The law is, that an execution, writ, or other process, appearing to be duly served in other respects, shall be deemed good, although it be not directed to any sheriff, which seems to be a provision for the very case before the Court. But if it is not, it is the same thing as to *Purcell*, and he should not complain.

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Motion denied.

Liggon *against* Smith.

September term, 1806.

Rules as to amending answers in Chancery.

IT was stated by Mr. *Wickham*, that the claim in this case was a stale one; that the suit was brought against the defendant as executor; and that the facts were not alleged to be within his knowledge; and on that account he moved to amend his answer, by stating the ground of defence more at large; to which Mr. *Randolph* objected; and the question was submitted.

By the Chancellor. If a question like the present has before occurred, it passed unnoticed. The several statutes which regulate, in many respects, the practice of this Court, are silent on this subject. I will therefore examine the practice, as laid down in the *English* books.

In 1 *P. Wms.* 297. (*Rawlins* v. *Powell*,) where an executor had a legacy, and no express disposition was made of the surplus; on a bill brought by the next of kin for a distribution, the executor answered, and waived the benefit of the surplus, by mistake of the law in that point; he was denied leave to amend his answer,

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though he proved that the testator intended that he should have the surplus.

In 2 *P. Wms.* 427. (*Countess of Gainsborough* v. *Gifford*,) a defendant was allowed to amend his answer after the hearing and decree, on the affidavits of the solicitor and his clerk, that the mistake was in the engrossing the answer from the draft; and the draft was produced, by which it appeared; and this was done after the same had been before denied on a petition, and on a motion, although no precedent could be shewn that this had ever been done after the cause was heard.

In 3 *Atk.* 489. (*Pearce* v. *Grove*,) the Court refused to allow a defendant to amend his answer by striking out of it the admission of a fact, by which the plaintiff would be deprived of the benefit of it as evidence, especially as he did not swear he was surprised into it, or ill-advised in setting it forth; and the Chancellor in that case distinguished between the admission of facts, and the admission of a consequence in law, or a consequence in equity; for the Court is to judge of the law, and the party not bound by any admission of it.

In 1 *Bro. Chan. Cas.* the Chancellor refused the defendant to amend his answer, after an indictment for perjury had been preferred or threatened, in order to avoid the indictment, although the Chancellor was satisfied that the defendant did not mean to perjure himself, as he had no interest in so doing; as that question would be proper before the Jury.

In 1 *Har. Ch. Pr.* 307. it is laid down, that the defendant may, without notice, move to amend his answer in a *small* matter; but, if it be in a *material* point, he must give notice; and that there are no settled rules for amending answers; but it is discretionary in the Court; and it is often done where issue is not joined.

In *Mitford's Pleadings*, 260. it is said, that where, upon hearing a cause, it has appeared, that the defendant has not put in issue, by his answer, facts which he

ought to have put in issue, and which should be in issue, to enable the Court to determine the merits of the case, he has been permitted to amend his answer by stating those facts; but he cannot amend his answer to state a fact, though to his advantage, which happened subsequent to his answer; but if this appears to the Court at the hearing of the cause, the proper way seems to be, to order the cause to stand, till a new bill, in which the fact can be put in issue, can be brought to a hearing with the original suit.

Upon a view of all these cases it seems, that the indulgence given by the Court, is allowed to the mistakes of parties, and with a view to save expense; and in such cases only where no injury can arise to other parties from the indulgence. But in general, with respect to the original parties, and their interest, no amendment will be permitted after the cause is at issue, and witnesses have been examined and publication passed; though a plaintiff has been permitted, even under such circumstances, to amend his bill, by adding a prayer omitted by mistake.(*a*)

(*a*) *Mitford's Pleadings*, 263.

Taking this view of the law, and the practice of the Court of Chancery in that country from which we have derived our system of Chancery proceedings, these general rules present themselves as proper to be established for the future government of the practice of this Court:

1. To allow a defendant to amend his answer must, from the nature of the case, be always at the *discretion* of the Court.

2. It may be done in a *small* matter, on motion, at any time before issue joined.

3. But, in a *material* point, the motion must be made upon an affidavit of the facts, which make it necessary; and after reasonable notice thereof to the plaintiff or his counsel, that the Court may take care that no injury be produced to the other party. And

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4. The affidavit ought to state, that, at the time of putting in the answer, the defendant did not know the circumstances upon which he makes the application, or any other circumstance upon which he ought to have stated the fact otherwise.

The modern practice in *England*, is to put in a supplemental answer, and not to amend the former;(*a*) but the reason of this change in that country (which is nothing more than a mere technical difference) is not discerned; and, if it were, it would not be adopted merely on that account; a practice which has become too fashionable in all our Courts. No: this Court will take the standard erected by the principles of the revolution, and declared by an ordinance of convention in the year 1776; and by that adopt its own rules. But, as to the case in question, it is not brought before me within any of the rules before laid down; and the Court should act with very great caution, even if it were. This suit is at issue: it has been tried and referred to a Commissioner: a report has been made, and that recommitted: this state of things enables the defendant to know where the shoe pinches; and to allow him to amend his answer, unless strictly within the rule of the Court, might be putting it in his power to avoid the consequences of the suit, which would be unreasonable at this stage of the cause. And, although he is an executor, yet, for any thing which appears to the Court, he is not, on that account, entitled to the indulgence.

(*a*) *Wells* v. *Wood*, 10 *Ves.* jun. 401.

Motion denied.

Chew *against* Beverly and others.

Exception to the general rule, that reports of commissioners must lie till the next term after that to which they are returned.

THE bill in this case was brought to subject the lands of the testator to the payment of the plaintiff's demand, by bond. An account was directed of the personal estate; and the Commissioner reported, that there was no personal estate of which an account could be taken. And the question was, whether, as the report had come in to this term, it should lie until the next term, under the rule of Court.

By the Chancellor. There is no *necessity* for this report to lie, as it is admitted that neither party means to except to it, and therefore the cause may come on.

Anonymous.

September term, 1808.

After a cause has been argued, a commission to take depositions cannot be obtained but upon the affidavit of the party, and by special order of the Court for that purpose.

THE Chancellor said, that, although he had made it a rule of Court, by consent of all the counsel, and for the convenience of the parties, that commissions to take depositions should issue, at any time after the cause in which they may be required is set for hearing, without any application to the Court for that purpose. Yet the practice under that rule had been carried too far; it had become very common to take commissions after the argument of a cause, in order to control the decision, by testimony not known of at the hearing; but this practice could no longer be tolerated, and that it must now be understood as positively settled, that after the argument of a cause, a commission to take deposi-

SEPT. 1808.

Anonymous.

tions cannot be obtained but upon the affidavit of the party, and by special order of the Court for that purpose. And so it was decided in *Dangerfield* v. *Claiborne and others*, *ante*, p. 397.

September term, 1808.

Anonymous.

Rules of practice.

1. In what manner suits are to be revived.

THE following points were resolved by the Court:

1. That no suit is to be revived without the names of the representatives of the deceased party or parties.

2. That the Clerk may, either in or out of Court, issue process to revive when the proper names are furnished, and not before.

3. That unless such process be executed with all due diligence, the benefit thereof *may* be lost to the party who obtained it.

2. An order for an account must be executed within 12 months.

4. That when an order is made for an account, to be taken before a Commissioner of the Court, or before auditors to be agreed upon by the parties, it must be taken with all convenient speed; and unless a report be made thereupon within twelve months from the date of the order, the benefit thereof will be lost to the party who obtained it, unless for good cause to be shewn to the Court.

September term, 1808.

Archer *against* Colly and wife.

A suit brought by husband and wife, to recover a demand in right of the wife, abates by her death.

THE bill in this case was brought to recover the plaintiff's demand against the defendants, on account of

the wife. Pending the suit she died; and the question submitted to the Court, was, whether the suit abated as to the husband.

SEPT. 1808.

Archer v. Colly & wife.

By the Chancellor. Let the suit abate, for such is the law.

Taylor's Administratrix *against* Taylor's Executors.

September term, 1808.

Construction of a will. What words give a *vested* interest which will pass to the representatives of a deceased legatee, though he was not to enjoy the estate till the death of a particular tenant for life, and died before that event happened.

THE bill stated, that *William Taylor*, on the 3d *October*, 1794, made his last will and testament, and died in a few days thereafter; that he left a wife, *Susanna Taylor*, and four sons, besides one in the womb who was born alive; that having made provision for one of his sons and his wife for life, he devised, *at her death*, one half of his land and marsh to his son *Beverly Claiborne Taylor* and to his heirs, and then proceeded in these words: "and the negroes, furniture, stocks and money in the "hands of the *brokers*, and every other article lent as "aforesaid," (to his wife,) "I direct shall be equally di- "vided among all the children I have, or may have, by "said wife *Susanna Taylor*, including in the said divi- "sion the child she may now be pregnant with;" that the said *Susanna* and *William Claiborne*, two of the executors named by the said testator, qualified, but were exempt from giving security; that they possessed themselves of the whole of the testator's estate, and had received the profits; that the said *Beverly C. Taylor* intermarried with the plaintiff and died intestate, of full age, in *April* last; that the plaintiff administered on his estate, and claimed that part of his father's estate, to which he would have been entitled if he had lived, till

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Taylor's administratrix v. Taylor's executors.

the death of the said *Susanna*, who, with her co-executor, was charged with wasting the said estate, and therefore the plaintiff, as to the personalty, required of the said executors that they might be compelled to give security for their past and future administration of the said estate, or that the same might be taken out of their hands, and that they might account for their transactions, and be restrained from selling or wasting any part of the said estate.

To this bill the defendants demurred, because they stated, that by the will of the testator, no *present* interest was vested in the intestate of the plaintiff, and therefore no interest could be derived by her.

By the Chancellor. This case depends upon this, whether the intestate of the plaintiff had a *vested* or *contingent* interest, in an equal part of his father's personal estate, on the death of his mother; and, from the words of the will, I take it to be a clear case, in favour of a *vested* interest, in the intestate of the plaintiff, but which he was not to enjoy until the death of his mother. The demurrer must be overruled, and the defendants ordered to answer.

September term, 1808.

Yates *against* Payne *et al.*

Practice, as to reviving where the plaintiff died, and there are *absent* and home defendants.

THE counsel for the plaintiff stated that the plaintiff was dead, and submitted to the Court, whether, as some of the defendants live out of the Commonwealth, process in the name of the plaintiff's executor, against them, to review, be necessary.

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Yates v. Payne et al.

By the Chancellor. There has been no instance of an order of publication, against an *absent* defendant, without original process; and the practice has always been to issue process, *to revive*, as well against the absent as home defendants; and then to make *publication*, in order to a revival of the suit: and so this case was revived accordingly.

Triplett *against* Tyler.

September term, 1806.

A copy of the record must accompany every application for a *certiorari*.

IN this, and three other cases, Mr. *Botts* moved for a *certiorari* to move each cause into this Court: the notice of the motions, and the facts stated as the ground of each, were admitted by the opposite counsel; but in neither case was there a copy of the record.

By the Chancellor. As the counsel opposed to the motion is in Court, and does not call for the records, the Court will dispense with them; but if this were not the case, they should be produced. Let a *certiorari* go in each case.

Hopkirk *against* Bridges.

September term, 1806.

A bill against a defendant, not an inhabitant of this country, and having no property therein, cannot be sustained.

THE bill, in this case, was brought for an account, which was directed by the former Chancellor, at the instance of the plaintiff, by counsel. The bill stated that the defendant was not an inhabitant of this Commonwealth; and among the exhibits was an order of publi-

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cation, in the usual way, against absent defendants. The Commissioner reported a balance due to the plaintiff, who, by counsel, now moved for a decree.

By the Chancellor. I am clearly of opinion, that a suit against a defendant, not an inhabitant of this country, and without any property therein, should not be entertained by this Court. *Bill dismissed.*

September term, 1808.

Mason *against* Mason *et al.*

If an answer contain *impertinent* or *scandalous* matter, it will be referred to a Commissioner to expunge such matter, *at the costs of the party* filing the answer.

THE defendant, *James W. Wallace*, had filed a very *indecent* answer, which had not been noticed, until the cause came on to be heard, when his counsel made an apology for himself, and assured the Court that he had not before seen the answer, and that it was in Doctor *Wallace's* own hand-writing.

By the Chancellor. I am perfectly satisfied that the counsel for Doctor *Wallace* had no hand in drawing his answer; and that the Doctor could not have intended any thing *indecorous* towards this Court; but yet, his answer cannot be viewed in any other light; and therefore I shall send it to a Commissioner for the purpose of expunging the *impertinent* and *scandalous* matter from it, *at the costs* of the Doctor; and so it was ordered accordingly. At the next term a proper answer was put in, accompanied by an apology from Doctor *Wallace*, which the *Chancellor* deemed very sufficient.

Gibbs *against* Perkinson.

September term, 1808.

THE defendant had obtained a verdict and judgment, at law, against the plaintiff, for some negroes; from which she appealed to the Court of Appeals; and, nevertheless, brought this bill for relief concerning the same negroes; and the only question was, whether the defendant could put the plaintiff to her election, as to *which* Court she should proceed in.

A person having a suit at law depending on an appeal, and bringing a bill for relief as to the same subject matter, will be compelled to make an *election* in which Court he will proceed.

By the Chancellor. The law has been very carefully examined, and there can be no doubt but that the plaintiff must make her election; and so it was ordered.

Miller *against* Beverleys.
and
Beverleys *against* Miller.

June term, 1809.

THESE were cross suits in equity, for the settlement of *Miller's* accounts, as trustee of *Robert G. Beverley.* By the deed which created the trust, three joint trustees, with the right of survivorship, were appointed; and first by the incompetency of one, and then by the death of another, the whole subject devolved upon *Miller.*

1. In what cases trustees are liable to pay interest on the trust-money retained in their hands; and how they may discharge themselves from such liability.
2. Compensation allowed to trustees for executing the trust.

These cases were ably discussed at the bar, and these points submitted to the Court;

1. As to the liability of the trustee to pay interest for money kept in his hands.

3. How far a trustee allowed for disbursements made by him, without the consent of his co-trustees.

4. What evidence ought to be required by a Commissioner, as to certain items of disbursements.

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2. As to his right to compensation for his services in performing the trust; and,

3. As to his right to claim for disbursements which he made without the consent of his co-trustees, while they were alive.

By the Chancellor. 1. As to the liability of the trustee, to pay interest for money kept in his hands.

In *Hunter's* and *Herndon's Executors* against *Spotswood*, 1 *Wash.* 145. *Herndon*, who was a sheriff, and had received money under the judgment of a County Court, in the case of an attachment, (though that judgment was afterwards reversed in the General Court,) was made to pay interest, because he had not paid it over, and taken security as he had been directed by the County Court, but had kept it.

In the case of *Granbury's Executor* against *The Granburys*, *ib.* 246. upon the subject of interest, the Court said, that an executor's account should be closed at the end of each year; that interest should be allowed upon the different balances, until the whole transaction ended; and, that it was no excuse to say, that there was a risk which the executor was not bound to run, in making the money productive; because, if that were true, he might apply to a Court of Equity for its direction, as to lending it to individuals, or to the public, which would make him safe; or he might bring the money into Court.

In the case of *Jones* against *Williams*, 2 *Call*, 102. the Court said, that the executor should be allowed interest upon a balance due him, on his administration account; because it was natural justice, that he who has the use of another man's money, should pay interest for it.

And in the case of *Hawkins's Executor* against *Berkeley's Executors*, (MS. *June*, 1804,) where *Hawkins*, in his life-time, had become the collector of *Berkeley*, the Court said, that *Hawkins* was in equity chargeable with

interest, on all sums by him received and not paid over to *Berkeley* in a reasonable time, from the time the debtors would have been bound to pay interest, if they had not been punctual in their payments; and in none of these cases does it appear, that the trustee had made any particular use of the money.

Upon these authorities, then, and that natural justice upon which they are founded, I shall lay down this general rule, that, in all cases whatsoever, a trustee, such as *Miller*, is liable to pay interest for the trust money in his hands, unless he can shew, that it was necessarily kept in hand for the purposes of the trust; and this he may do upon oath, subject to be controlled by other testimony, and the circumstances of the case.

Miller comes within this general rule; for, by his own answer, on oath, he has not exempted himself from it: nay, he admits, that he kept but one money chest, and that it is probable, that all the money he received was put together; but avers, that he never was in cash for the estate of the *cestui que trust*, and refused payment of a just debt: this I believe to be true; but he has not denied the use of the money on his own account; and, from the circumstances, there can be no doubt of it; for, evidently it was for himself, and not for the creditors of the *cestui que trust*, that induced him to allow Col. *Taylor* a discount of ten *per cent.* for prompt payment; which appears, first, from the trustee's account, No. 44. and secondly, from the Commissioner's report; and, at that time, there were funds in his hands; and that claims to the amount of the money received of Col. *Taylor*, were not paid in twelve months afterwards. This does not look as if they were pressing upon the funds of the *cestui que trust*, however they might have been upon the trustee; for, if the fact was so that the creditors of the *cestui que trust* were pressing, the money so received would probably have been paid away upon the spot; but

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we know, generally speaking, that men are in the habit of using all the money they can command; which may be some apology for Mr. *Miller*; but, when it does not belong to them, they should pay interest for it.

Upon this view of the subject then, Mr. *Miller* must pay *interest*; and now the question is, *from what time?* In the case of *Herndon's Executors*, the interest was paid from the date their testator received the money; because he only had to pay it over, which he did not; and therefore it became a debt due by himself, from the time he received it.

In the case of *Granbury*, where there were running accounts, as is generally the case where executors or administrators are concerned, interest was allowed upon the balance of each year, from the end thereof, until the whole transaction ended; upon this principle, that an executor or administrator should balance his account annually: and, in the case of *Hawkins*, who was only a collector for *Berkeley*, interest was allowed on all sums which he received, and did not pay over in a reasonable time, from the time the debtors would have been bound to pay interest, if they had not been punctual in their payments; but this case, as well as that of *Herndon's Executors*, proves only that circumstances must have their influence in each case, notwithstanding the case of *Granbury*, *which lays down a very correct general rule, as to executors and administrators*, and which would be applied to the present case, but for this reason, that Mr. *Miller* was a *merchant*, and the moment he received the money, had it, or might have had it, in active use.

As it seems to me, such should be the rule, for this plain reason, that when a trustee knows he is to be accountable for interest, in all cases whatsoever, *unless he can shew, that for the purposes of the trust he held the funds*, he will either be content to pay it, or he will do as the Court said in *Granbury's* case, apply to the Court for its directions, as how he shall dispose of the money,

for his own safety, or he will bring it into Court, and apply it as he may be directed. This rule admits of no *fraud*, upon the one hand, nor imposes any *hardship*, upon the other; but if he is not to account for interest, unless he makes a *profit*, he has every inducement, so far as his interest can have an influence upon him, to apply the funds to his own purposes, and to prevent a discovery of the profits; a rule which admits of frauds and impositions: but the rule of a Court of Equity should be so settled as to admit of neither.

This brings me to the second point; as to his right to compensation for his services in performing the trust.

The *English* books lay it down that, regularly, a trustee is not to have any thing for his own labour and pains, though they admit, that even there, some have thought this a great hardship. It is true, we have adopted the principles of the *English* law in many respects, so far as they are not incompatible with the principles of our own government, but we have not, by that, adopted indiscriminately all their decisions; and whatsoever may be my respect for them, as having been delivered by able judges, yet I must do here as they sometimes do there, that is to say, reject those decisions which do not conform to the standard of that justice, which commands us *to live honestly, hurt nobody, and render every one his due.*

Those who laid down the rule there, that a trustee should not have any thing for his own labour and pains, seem to have done it without regard to that simple principle, but of unerring truth, *that the labourer is worthy of his own hire;* and hence it might well have been thought a hardship, even in that country where so monstrous a rule was suffered to obtain; it certainly has never taken foothold in our country; but if it has, so far as *I* can go, I shall blot it out for ever.

In the case of Commissioners acting under the order of the Court, *where they have sold and received the mo-*

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ney, a commission has never been refused within my knowledge. In the case of attorneys at law, it is every day's practice; and so in the case of executors and administrators. Attend to the language of that Judge, of whom I boast with pride, because he was a native born *Virginian*, and an ornament to the bench; I mean the late President of the Supreme Court of Appeals, Mr. *Pendleton*. In the case of *Jones* and *Williams*, 2 *Call*, 106. upon the subject of interest upon a balance due an executor, he said, "interest is allowed, because it is natural justice that he who has the use of another's money, should pay interest for it:" and so I say, in this case, that commissions must be allowed, because it is but natural justice, that he who has the benefit of another's services, should pay for them: but Mr. *Botts* said *not*; because, said he, the trustee might *contract* for a compensation; and so might the Commissioners of the Court, or the attorneys at law, but it is never done, upon this universal understanding, that there must be something given, where something is received.

This brings me to the question, *what commission* should be allowed? And I am of opinion, that the same rule which the Court laid down in the case of *Granbury*, before mentioned, should be laid down in this case, and that was to allow a commission of *five per cent.* which should be allowed for risk, trouble, and such expenses, about the trust, as were incurred within the course of the trustee's *own business*; but, when he is taken *out of that course*, upon the subject of the trust, he should also have such expenses allowed as are *reasonable*.

But, *admitting* this to be the *general rule*, the counsel contended, that *Miller's* claim to compensation was not within it; because, said the counsel, *Miller* undertook the trust *gratuitously*, but the depositions referred to, *do not prove it*, and so the general rule applies.

But then, said the counsel, commissions should not be allowed on the widow's money. But the answer is, that

out of the sales of the trust estate, a purchase was to be made for her, in lieu of her dower in the whole estate, and this was surely as much a part of the trustee's duty as it was to supply *Beverley*, or to pay any other creditor. But then it was objected, that *Miller* should not be allowed commissions upon his store debts; that is to say, upon money due to himself for goods advanced for the *cestui que trust*, and this would be true, if *Miller* was allowed a separate commission for paying away money; but he is not, for his commission is allowed upon the funds which he had to raise; and whether they are paid to *creditors*, to the *cestui que trust*, or retained by *himself*, it should not vary his compensation.

Another objection was made, that he had claimed commissions on 90*l.* paid by *Buckner* to *Taylor*, in which *Miller* had done nothing more than to sign a lease with the other trustees: this is true; but the answer is, that although the commission of five *per cent.* upon *this particular item*, may be more than a reasonable compensation, yet there may have been other transactions, where that commission would not be an equivalent compensation; and the rule has been fixed upon this principle, that a commission of five *per cent.* should be allowed upon the *whole transactions taken together*.

Another objection was made, that *Miller only* claimed compensation, although the other trustee had acted in a degree; but it is admitted, that *Miller* received and held all the funds, and of course incurred all the risk, trouble and expenses, incident thereto, and must pay all the interest, which places his claim to the usual commission upon fair ground; subject, however, to the claims of his co-trustees for their services; but as they have made none, the presumption is, that they have none; and it is very clear that they would not obtain much.

Another objection was made, that the claim by *Miller* to compensation, is for money held by himself: this is a

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strange objection, because it is the very ground of his claim.

And the last objection was, that he claims a commission upon near 200*l.* which he received of Col. *Taylor*, upon a discount of 10 *per cent. per ann.* There would be great force in the objection, *if he was allowed the premium;* but the Commissioner has rejected it, and it forms one of *Miller's* exceptions, which will receive the attention of the Court in due time. And this brings me to the third point; as to his right to claim for disbursements which he made without the consent of his co-trustees while they were alive.

The evidence of this fact, is the certificate of one of the trustees, which is excepted to by *Miller*, and is certainly no evidence, but of that trustee's own misconduct; for, if he knew that *Miller* was acting improperly, it was his duty to have prevented him.

It is true, they were *joint trustees*, and that the rule of law is, that trustees all have an equal power, interest and authority, and cannot act separately, as executors may, but must join, both in conveyances and receipts; but, I apprehend, that this is as it respects the rights of *third persons*, and not as it respects the rights of *cestui que trust* and *trustee;* for although one trustee is not, *in general*, liable for the acts of another, yet each is liable to account to the *cestui que trust*, for his own acts; and *as between them*, those acts are binding, and upon that principle the disbursements ought to be allowed in this case. Could it be supposed, that the three trustees, on every occasion, were to be convened to do every act, however unimportant, for the *cestui que trust?* Such a doctrine would be unreasonable in the extreme.

And now as to *Miller's* exceptions to this account: a general rule may suffice for the Commissioner, that in all cases, where, from the nature of the transaction, the trustee might have obtained satisfactory proof, it should

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now be required of him; but, in all cases, where, from the nature of the case, such proof could not reasonably be expected, as in the case of expenses incurred out of the course of the trustee's own business, or for spirits at the sales of the estate of *cestui que trust*, or for the postage of letters, or costs of lawsuits, and the like, they ought to be allowed upon the *oath of the trustee*.

As to the *premium* allowed Col. *Taylor*, it was properly rejected by the Commissioner.

As to the profit made by *Miller* on some tobacco for which he credited the *cestui que trust*, it is lost sight of in the advantages which *Miller* derived from the advancement of goods to the family of *Beverley*.

The report must be recommitted, to be reformed according to the foregoing principles.

Yancy *against* Fenwick.

June term, 1809.

In a bill for an injunction where relief might have been had at law, the plaintiff must state why he did not defend himself at law.

THE bill in this case was brought to be relieved against part of a judgment obtained at law on a bond, executed in *August*, 1797, on account of some payments admitted to have been made, posterior to the said bond, but before the judgment, without even stating a reason why the defendant did not defend himself at law.

By the Chancellor. This is a plain case. The plaintiff might have defended himself at law; but, without assigning a reason why he did not, he comes into this Court, as if it were a matter of right. But in that he is mistaken; for this Court can only give relief, where the law affords none; unless the party, asking for it, could

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not avail himself at law; and then the circumstances must always be stated in the bill, that the Court may judge of them.

Bill dismissed with costs.

Spring Vacation, 1809.

Cutting *against* Carter *et al.*

Injunction to stay waste denied, there appearing no impediment to the action of waste at law.

THIS was a motion by Mr. *Botts* for an *injunction* to stay *waste*, which the Court refused, as no impediment appeared to the action of *waste at law*.

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Jennings and Robinson *against* The Attorney-General.

All deeds of trust and mortgages must be proved by *three* witnesses, or acknowledged by the party, and recorded within eight months, or they will be void as to creditors and subsequent purchasers, and they are only valid, as to such, from the time when they are *fully* executed.

THIS was a motion for an injunction to stay the execution of a judgment on behalf of the Commonwealth against *Morgan Tomkies*, late Sheriff of *Gloucester* county, upon the ground, that he had mortgaged to the plaintiffs, several of the negroes in his possession to secure to *Jennings* $997, and $966, and to *Robinson* $1,000. The deed to the former was dated *Sept.* 1, 1808, and attested by three witnesses. The deed to the latter was dated on the 20th *October* following, and attested in like manner.

Mr. *Wirt*, the counsel for the plaintiffs, stated, that the name of the *third* witness to each deed was subscribed yesterday, which, as it does not appear, he thought it was his duty to state, and he observed that whatever

might be the fate of the deed to *Jennings*, yet as the deed to *Robinson* bore date within eight months last past, and might be proved or acknowledged within that time, he presumed it was a valid deed, as it would have relation back, upon either of those events.

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Jennings and Robinson v. The Attorney-General.

By the Chancellor. The deed to *Jennings* is clearly void as to creditors, and as to subsequent purchasers for a valuable consideration without notice, as it was not recorded in the time and manner prescribed by law; and so this Court said in the case of *Moore's Executors* against *The Auditor*, 3 *H.* & *M.* p. 232. This Court determined, in that case, that all deeds of trust and mortgages of slaves or other personal estate, not proved by *three* witnesses, or acknowledged and recorded as prescribed by law, were void as to creditors and subsequent purchasers for a valuable consideration without notice thereof. This case went to the Court of Appeals, and, in *October*, 1808, was affirmed. The deed to *Robinson* can only be considered as a valid deed as to creditors, from the time the third witness subscribed his name to it on yesterday, and therefore creditors and subsequent purchasers without notice, for valuable consideration before that day, cannot be affected thereby. But again, this is a proper case at law, and this Court should not interpose at this time.

Motion for the injunction denied.

Chapman *against* Chapman.

A notice to take a deposition, given to the *overseer* of the party, who resided part of his time in the state and part out, is not sufficient.

THE principal question in this case was, whether notice given to the *overseer* of the defendant, who lived about half the year in, and the other half out of the state, to take depositions, was good.

By the Chancellor. A notice to a party living within the state is good, if given to him, or delivered in writing to any free white person above the age of sixteen years, who shall be a member of the family of such person, and shall be informed of the purport of such notice, or left at some public place, at the dwelling-house or other known place of residence of such person; 1 *Rev. Code*, 113. *Ent.* 42. and to a party not living within the state, or not having an agent or attorney within the same, to whom it can be given, it shall be good if published in the *Virginia Gazette*, or in any other public newspaper printed within this Commonwealth, for four weeks successively, stating the time and place, when and where, the witness is to be examined, and the name of the witness, together with the names of the parties to the suit in which such witness is to be examined. *Ib.* 280. s. 17. It is clear, therefore, that the notice in this case was not good, as it was not given to such an agent or attorney as was contemplated by the law; for it is not the duty of an *overseer*, according to the course of the country, to attend to such subjects, but if it was, the plaintiff should have proved it. But, as he has not, notice should have been published as directed by the last recited act; for, unless the defendant was *known* to be living within the state, notice as directed by the first recited act would not be good.

Mosby *against* Haskins *et al.*

Rules in granting injunctions. Under what circumstances relief will be granted, but at the costs of the complainant.

THE bill in this case was brought to be relieved against a judgment at law, obtained under these circumstances: that the plaintiff had no knowledge of the existence of the suit at law, until after the judgment was obtained; and he presumed that when the writ was served upon him, it was understood to be a process in a suit in Chancery, which had been brought, as he supposed, to subject his wards, but which he found had been dismissed. The prayer of the bill was for an injunction and general relief. To this bill *John Haskins* filed an answer, and stated, among other things, that if the inattention relied on in the present case be deemed a sufficient ground for the interposition of a Court of Equity, it would always be in the power of a party to make his defence in a Court of Equity, instead of a Court of Law. And a motion was now made to dissolve the injunction which had been awarded.

By the Chancellor. The general rule is, that where relief can be afforded at law, it shall not be asked for in this Court, *but under such circumstances* as the plaintiff could not control, and which must *be true*. By these plain and simple principles then, let the present question as to jurisdiction be tested. A suit in Chancery had been brought, which might have embraced this very subject, and the defendant, the present plaintiff, was served, as he supposed, with process in that suit, and therefore he may have been so far mistaken, as to aver with great truth, that he had no remedy at law, since he suffered a judgment to go against him, when in fact he did not know that he was sued. Could there have been a more complete surprise, than in the first instance to

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have met with an *execution* instead of a *capias?* There certainly could not to my mind; and hence a good ground for relief in equity. But it is said, that this will always admit a party to make his defence in equity, instead of at law. To this argument two sufficient answers may be given; 1. That if, upon the coming in of the answer, *the circumstances relied upon in the bill* appear not to be true, the Court will always dissolve the injunction; as in this case, if the defendant could shew that before the judgment at law the plaintiff really knew of the suit, he should not be any longer entertained in this Court, but should abide the consequences of his *own* neglect; and, 2. Though the circumstances may be true, and relief afforded, yet, *in general*, it must be at the costs of the plaintiff.

Attention to these rules will afford, as it is believed, a sufficient corrective to those who might otherwise be disposed to sport with the sacred obligation of an oath.

Motion to dissolve denied, and the accounts referred to a Commissioner.

Mountjoy *against* Lowry.

How far the settlement of an executor's or administrator's account, made under an *ex parte* order of Court, is to be regarded as evidence of the truth of the statements therein contained.

*** See the case of *Atwell's Adm'r* v. *Milton*, in the Court of Appeals, *ante*.

COMMISSIONER *Parke*, at *Fredericksburg*, made a report in this case, by which he submitted this question, whether an executor's account, settled *ex parte* and without *notice*, by order of a County Court, should be considered by him as a *final* settlement or not.

By the Chancellor. I have given this subject due consideration, and whatever may have been the practice of the *Ecclesiastical* Courts in *England*, I am perfectly satisfied that, from the *first* settlement of this country, the *County Courts* have always, at the instance of an executor

or administrator, or any party *interested* in his account made an *ex parte* order for the settlement thereof before Commissioners, without any summons to the parties concerned; and such settlements, when made, have always been received as *prima facie* evidence of the contents thereof. This has become the settled course of the country from long and uninterrupted usage, and probably from this consideration, that the executor or administrator must prove the items in his account, which the Commissioners are *then* bound to allow, unless a party being present, and interested in the settlement, can falsify any of them; but it is well known, by those who know any thing of the concerns in common life, that such settlements always take place in the neighbourhood of the parties, and that they generally do attend, and more especially if any dispute among them produced the order for the settlement; but whether they do or not is not material, as the *decision* of the Commissioners is not obligatory either way; and although the settlement, when made, is usually put of record as it should be, yet it may afterwards be questioned by any one *interested* therein, who may exhibit his bill in equity for that purpose, and who may be allowed *to surcharge and falsify* the same; and in no instance (as far as I am informed) have such settlements been considered as more valid, because notice thereof had been given to the parties concerned, unless where a suit for that purpose was instituted; and *then* the subject of controversy, as well as the parties, being known, notice of the settlement should be given, in order to put an end to the contest.

I understand from the *Chief Justice*, that in the Federal Court of this place, such settlements are always admitted as *prima facie* evidence; and such seems to be the opinion of Judge *Tucker*, in the case of *Anderson and Starke* v. *Fox and others*, 2 *Hen. and Munf.* 260. although the question was not decided by the Court, in that case, as necessary to the merits of the cause: nay,

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a practice so long pursued without any change in it, affords to my mind the best evidence of its utility; for, monstrous would be that rule, which should require executors or administrators to preserve, at their own peril, the loose vouchers of their transactions, which derive no additional validity from being thrown into the form of an account. They were subject at first to be falsified, and so is the account formed out of them likewise subject to be *surcharged and falsified*. Upon this view of the subject, the Court gave this direction to the Commissioner: that the settled accounts of executors or administrators, by order of the County Courts, should be taken as *prima facie* evidence of the several debts and credits therein, subject to be *surcharged and falsified* by any person who may be affected thereby.

M'Key, Executor of Fuqua, *against* Young.

A purchase of land, by an executor, which had been sold by him agreeably to the will of his testator, is *valid*, if it appear that his conduct in the sale was fair and correct.

*** See *Anderson and Starke* v. *Fox and others*, 2 *M. & M.* 245.

THE principal question in this case was, whether a sale of a tract of land, made by the plaintiff, agreeably to the will of his testator, was valid, as the plaintiff himself became the purchaser.

By the Chancellor. The plaintiff offered the land twice for sale at *Charlotte* Court-House, on a Court day, and was himself the highest bidder, at each sale, and gave the estate to his testator's credit, for the highest price, as the depositions referred to by the Commissioner, at the instance of the defendant *Young*, prove; as they also do that the conduct of the executor was fair and correct. Under these circumstances, I consider the sale valid, as made by the executor in this case, and should

be confirmed; which some of the legatees have don since they came of age, by executing a deed for that purpose; and I believe that this opinion will be found to accord with the universal understanding of the people of this country; for there is nothing more common than for an executor to be a purchaser of his own sale of his testator's estate, and most commonly to the advantage of the legatees.

M'Key v. Young.

Sorrel *against* Procter.

THE defendant was an administrator, and the report of the Commissioner was against him in favour of the legatees, and the question submitted to the Court was as to the costs.

In what cases trustees, executors or administrators, shall pay costs out of their own estates.

By the Chancellor. Wherever a trustee is free from fault he should not pay costs, but where he is not, he should. In this case the defendant has been made personally liable for some of the debts, the loss of which grew out of his neglect, and he must pay costs, as was done in *Barr* against *Barr*, 2 *H.* & *M.* 26. for in fact, the suit is against *him*, and not against his *intestate*.

Lightfoot *against* Price.

THE principal point in this case was, as to the mode of adjusting interest.

What is the proper mode of calculating interest, where partial payments have been made.

By the Chancellor. I concur in the opinion, given by the late Judge of this Court, in the year 1795, in the case of *Ross* v. *Pleasants, Shore & Co. and William*

Lightfoot v. Price.

Anderson, that so much of any payment as is equal to, or exceeds the interest, is to be applied to the discharge thereof, and the residue towards discharging the principal, unless the debtor, at the time of the payment or before, directed otherwise; that is to say, from the sum of principal and interest, computing the latter to the time of payment, the payment is to be deducted, and the balance forms a new capital; on that, interest is to be computed from that time, but with this caution, that the new capital be not more than the former, so that if the payment be less than the interest due at the time, the surplus of interest must not augment the remaining capital; because that would give interest upon interest, which would be unlawful.

The report was therefore recommitted, and the Commissioner directed to reform it according to the foregoing opinion.

Skinner and Co. *against* Dodge and Cobb, Prosser and Moncure, and William Marshall *et al.*

A consignee of goods may dispose of them in the way of trade; but he cannot *pawn* them for his own benefit, so as to devest the property of the consignor. In this case, the facts being clear, the consignors (the plaintiffs) are not to be turned round to a Court of Law; but a decree may be entered in their favour at once, against the pawnees.

THE plaintiffs consigned a parcel of goods to the defendants *Dodge* and *Cobb*, to be sold upon commission; they pawned a part to the defendants *Prosser* and *Moncure*, vendue masters; and, failing, conveyed all their *own* goods and effects to the other defendants *Marshall* and *Kimball*, in trust, for their creditors; and delivered the remaining goods of the plaintiffs to the trustees, and they were sold as well as the goods pawned. The bill was therefore filed to discover the goods pawned, as well as those sold by the trustees, or the value thereof. The answer made a full disclosure of all the circumstances; but the vendue masters contended that they should be considered as purchasers, as they *lent* money upon the goods pawned.

Skinner & Co. v. Dodge et al.

By the Chancellor. A consignee of goods hath no right to *pawn* them as a security for his *own* debt, and if he does, the *pawnee* derives no right thereto; for no man can transfer a right which he hath not, to another: and besides, it is a violation of that confidence reposed in the consignee, and it is of the first importance to that intercourse which should be kept up among men, that such confidence should not be abused. As to the goods sold by the trustees, there is as little doubt about them; for they were not included in the conveyance; and if they had been, it would not have altered the case, as it would also have been a violation of the confidence reposed in the consignee, and he could not by any act of his devest or change the absolute rights of the consignor, but by making such a disposition of the goods as he was *legally* authorized to make; and unless the facts were doubtful, the Court should not direct an issue, or turn the plaintiffs round to an action at law, but will, as the facts disclosed are clear, afford them the relief sought by their bill. And a decree was entered accordingly. The vendue masters appealed, but were advised against the prosecution of it, and the appeal was not carried up.

Wilson *against* Triplett.

An *interlocutory* decree being affirmed by the Court of Appeals, does not change its terms; but it remains to be executed here in the same manner as it did before the appeal; therefore, in this case, the appeal being affirmed without a deduction of war interest on a *British* debt, such deduction will be made in this Court; especially as the plaintiff is asking the aid of the Court to carry that decree into effect.

THE bill in this case was filed to foreclose a mortgage, dated *October*, 1774, and the Commissioners to whom the accounts were referred, had reported a balance due thereupon of 609*l.* 17*s.* 3*d.* on the 14th *September*, 1775, with interest from that time till paid, upon which

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this Court, in *September*, 1798, decreed that unless that sum, with the interest upon that part thereof which was principal money, and the costs, (deducting the amount of a bond of 80*l.* payable 1st *October*, 1774, and interest due by *Francis Willis*, which the plaintiff had received and not returned,) should be paid by the 1st day of *April*, 1794, the defendant was to be barred and foreclosed in his equity to redeem the mortgaged premises, and Commissioners were also appointed to make sale thereof. From this decree there was an *appeal*, but the decree was *affirmed*.

On the 19th *March*, 1798, the plaintiff and *Bernard Hough* agreed, that as the latter had bought part of the mortgaged premises for 1,000*l.* the former should secure the payments due for the same, and *relinquish the said mortgage, and look to the said Triplett for any balance that might be due by him.*

In 1801, this Court again appointed Commissioners to ascertain the balance due upon the mortgage, and to carry the decree aforesaid into effect; and they made two statements; 1. Charging the interest for the war, the balance due to the plaintiff was $827 37 cts.; 2. Deducting the war interest, a balance of $186 22 cts. was due to the defendant; and they reported, that if the second statement was correct, the balance due thereupon should be subject to the plaintiff's costs before the date of his agreement with *Hough*, by which they conceived the mortgaged premises to be released.

In *June*, 1808, Commissioner *Keith*, on the motion of the plaintiff, was directed to state the balance due on the mortgage, and to report the same, which he did accordingly. 1. Charging the war interest, and deducting *Willis's* bond and interest, on the 14th *May*, 1779, when it was assigned to the plaintiff, made the balance due to him on the 25th *August*, 1808, 333*l.* 12*s.* 4*d.* and,

2. Deducting the war interest and *Willis's* bond, on the 14th *Sept.* 1775, with interest from 1st *October*, 1774,

made a balance due to the defendant of 58*l.* 11*s.* 5*d.* Upon this report three points were submitted to the Court.

1. As the decree of this Court did not deduct the *war interest*, and had been *affirmed* in the Court of Appeals, could that interest now be deducted?

2. Was not the agreement with *Hough* a release of the mortgage?

3. At what time should *Willis's* bond be credited?

By the Chancellor. Upon the first point, the decree of this Court was not a *final*, but an *interlocutory* one, and its terms were not changed by being *affirmed.*

The decree, therefore, remains to be executed, in like manner as it was before the appeal was taken; and as the plaintiff is asking the aid of the Court to carry that decree into effect, he should not complain of the *maxim, that he that will have equity done to him, must do it to the same person;* and therefore he cannot be allowed interest during the war, as that would be to allow him what is refused to all other *like* creditors; and as this turns the balance against him, there is no necessity of deciding upon the effect of his agreement with *Hough;* and as to the third point, it is very clear, that the plaintiff should credit the defendant for *Willis's* bond and interest, on the 14th *September*, 1775, when the balance due upon the mortgage was ascertained; and so the Commissioner has, in one of his statements, done it; and the balance due the defendant on the 14th *July*, 1818, was 58*l.* 11*s.* 5*d.* after allowing the plaintiff his costs to that time: which sum, with interest, was decreed to the defendant accordingly.

Miller and Miller *against* Pendleton *et al.*

Securities who have a *lien* on the property of their *principal* by mortgage, but which was defective, it being proved by *two* witnesses only, were allowed to stand in the place of the *creditor*, as to the assets of the principal.

THE plaintiffs were bail for one *Timberlake* ads. *Gray*, who obtained judgments at law against them; and *Timberlake*, to indemnify the plaintiffs, mortgaged several negroes; but the deed was admitted to record in *Caroline* County Court, upon the proof of *two* witnesses only. *Timberlake* then died intestate, and administration of his estate was committed to the Sheriff of the said *county*, who sold the same, including the mortgaged negroes; and to prevent a distribution of these proceeds, the present bill was filed, and an injunction awarded.

The answer denied notice of the mortgage, and a motion was now made to dissolve; and, by consent, the cause was finally heard.

By the Chancellor. The plaintiffs are entitled to no preferences among the creditors of the intestate, as the deed was not recorded in the manner prescribed by law; but as the plaintiffs have paid, or are bound to pay, *Gray's* judgment, they must be allowed to stand in *Gray's* place, and take that proportion of the assets to which he would be entitled, if he was now a creditor of the intestate; and so it was decreed accordingly.

Cabell *against* Cabell *et al.*

Allowance to Commissioners appointed to divide lands under a decree of the Court.

THE bill in this case was filed for a division of some lands in the county of *Buckingham*, and the Commissioners who acted, claimed an allowance for their services.

Cabell v. Cabell et al.

By the Chancellor. Let each be allowed five dollars *per* day for their services. This sum was allowed about ten years ago, by my predecessor, to each of the Commissioners who acted in surveying and dividing the lands in the case of *Carter* against *Carter*, called in this Court the *Fryingpan case.*

Lane *against* Lane,
and
Lane *against* Lane.

In what manner an attachment for not performing any order or decree of this Court, ought to be executed.

THESE were cross bills for the settlement and division of the estate of the testator.

The executor had been ordered to account before certain Commissioners, which he had failed to do, and an attachment had been ordered against him. The attachment was returned *executed;* but the executor was going at *large*, and now came into Court and moved to *discharge* the attachment; and the plaintiffs in the first suit submitted to the Court the course to be taken.

By the Chancellor. The law is, that every person taken by an attachment for not performing any order or decree of this Court, shall be committed to the gaol of the county where the attachment is executed, and thereupon a writ of *habeas corpus* may be moved for, to bring up his body, if in custody, or if not, then the *Serjeant* of the Court may be sent to bring him, that he may be committed; but if the return upon the attachment be *non est inventus*, it is then proper to move for an attachment with proclamations, which if also returned *non est inventus*, a commission of *rebellion* may issue, as was done in this

Lane. v. Lane.

Court in the case of *Purcel* against *Purcel*. In the case before the Court, the executor is at large upon the return of *cepi corpus*, and if he was brought up by the *Serjeant* of the Court, the course would be to *commit* him until he should clear his contempt; that is to say, until the Court could be satisfied that its order would be obeyed. This would be the regular course of proceeding, but attended with more inconvenience, than the mode that was adopted by this Court in the case of *Fisher* against *Fisher*, the effect of which is the same; and therefore the Court would prefer that mode now: and an order was made to this effect; that if the said executor do, on or before the tenth day of *August* next, comply with the terms of the decretal order pronounced in this cause, the 13th *September*, 1805, to the satisfaction of the Commissioners therein named, to be certified to this Court, the said attachment is to be discharged as an act of this day; but if the said Commissioners should certify to this Court, that the said executor had failed to comply with the said decretal order in manner aforesaid, then it is ordered, that the *Sheriff* of the county of *Loudon* do commit the said executor to the gaol of the said county, until the *Judge* of this Court, in Court or out of Court, is satisfied that the said executor hath fully complied with the said decretal order, and shall order him to be discharged.

Stanard *against* Rogers.

A party who might have pleaded *non est factum* in an action at law, and who merely *wrote* from relief in

THIS was a motion for an *injunction* to be relieved against a judgment upon a forthcoming bond, obtained under these circumstances: that the father of the plain-

to counsel to defend him, is guilty of such *neglect* as will preclude h quity.

tiff directed the deputy-sheriff to sign the plaintiff's name to the bond; that when he received notice upon the bond, he wrote to counsel to defend him, but his letter got to hand too late, and a judgment passed against him; since which he had replevied the debt, and in a *short* time the replevin bond will be due.

By the Chancellor. The plaintiff had a day in Court, of which he should have availed himself, or he should state some satisfactory reason why he did not, for it is not sufficient that he merely wrote to counsel, but he should have gone in person, or have sent his plea of *non est factum*; but if from any circumstances, not imputable to himself, he could not have gone, or his plea had miscarried, and he had made his motion for an injunction, without standing by and acquiescing in the progress of legal proceedings against himself, this Court might interpose: but the defence of the plaintiff was lost by his *own* neglect, and his after acquiescence until an execution, and then replevying the debt, and waiting until the time of the replevin is nearly out; and more especially, since his father, who, it is said, directed his name to be signed to the bond, is since dead. This Court cannot, under all these circumstances, interpose.

Motion denied.

Hope *against* Barber *et al.*

A MOTION was made by Mr. *Botts*, to set aside the decree of the last Court as to one of the defendants who was then dead, as now proved by an affidavit; and to

1. A decree of a preceding term, against a defendant who was then dead, set aside on motion:

2. On what terms the answer of a defendant, against whom there has been a decree, as an *absentee*, may be received.

Hooe v. Barber et al.

file the answer of another defendant against whom there was a decree, as being out of the country.

By the Chancellor. Let the decree be set aside as to the defendant who was dead at the time of the rendition thereof; but the answer of the absent defendant cannot be received, but upon paying down or giving security for the payment of such costs as the Court shall think reasonable, unless the plaintiff will consent that the answer may be filed without such security.

Smith *against* Jenny *et al.*

1. How *subpœnas* or foreign attachments, should be endorsed.
2. What is the appearance day in the Superior Courts of Chancery.

THE object of this suit was to attach the effects of the defendant *Jenny*, as an absent debtor, in the hands of the other defendants, and *notice* to that effect was *endorsed on the subpœna*, which was returnable on the 17th day of this term: and now Mr. *Wirt* moved for an order to restrain the home defendants from parting with the effects of the absent defendant, until the further order of the Court; and for an order of publication against the absent defendants.

By the Chancellor. The *appearance* day in all cases is on the *second* day *after the term* to which the *subpœna* is returnable; (1 *Rev. Code*, p. 65. s. 24.) and in the case of absent and home defendants, the latter holding the effects of the former, and the *appearance* of such absentee or absentees being not *entered*, and security given, to the satisfaction of the Court, for performing the decree, upon affidavit that such absentee or absentees are out of the country, or that upon inquiry at his, her or their usual place of abode, he, she or they could not be found

Smith v. Jenny et al.

so as to be served with process; in all such cases, the Court may make any order, and require security, if it shall appear necessary, to restrain the home defendants from paying or conveying away, or secreting the debts by them owing to, or the effects in their hands of, such absentee or absentees; and for that purpose may order such debts to be paid, and effects delivered, to the plaintiff or plaintiffs, upon their giving sufficient security for the return thereof to such persons, and in such manner, as the Court shall direct. (*Ib.* 115. s. 2.) Hence it follows, that, regularly, no *order* can be made, agreeably to the terms of the law, until the term *succeeding* the appearance-day; but the plaintiff may endorse his *subpœna* as he has done in this case, in the terms of the law, which will be a sufficient notice to the home defendants, not to part with the debts or effects in their hands without leave of the Court. and so it was settled to be a correct practice, *by the Court of Appeals*, in the case of *M'Kinn* against *Fulton and others*; (*MS.*) and there is great propriety in it, for without such notice upon the *subpœna*, creditors might be defeated, and the clear intention of the legislature frustrated; to prevent which, and to carry into effect the very object of the law, the Court would, if it were necessary, *upon affidavit*, make any order for that purpose, *before* the return-day, which it could make *afterwards*: but in the present case no such necessity appears.

Mr. *Wirt* withdrew his motion.

Emerson *against* Berkley and Stone.

How to proceed in introducing *viva voce* evidence at the hearing.

THIS was a motion by Mr. *Randolph* for a *subpœna*, to summon a witness to give *viva voce* evidence to some fact upon the hearing.

Emerson v. Berkley and Stone.

By the Chancellor. When a party intends to produce *viva voce* testimony in Court, upon the hearing of a cause, which is sometimes done (but without a cross-examination) to prove the execution of deeds, and the hand-writing of letters, or the signatures thereto, and the like, he should apply before that time for an order for that purpose, upon an *affidavit*, giving a proper description of what is intended to be proved, as well as notice to the adverse party of the motion.

Motion at present denied.

Watts's Executors *against* Robertson.

Practice. 1. As to executing attachments to compel an appearance. 2. Proceedings on decrees *nisi*. 3. How decrees on foreign attachments should be entered.

ON an appeal. The appellee had a judgment in *Amelia* County Court for 1,220lb. of tobacco, with interest and costs against one *Sturgin*, and to recover which, as the said *Sturgin* had removed out of the Commonwealth, the appellee filed his bill in Chancery in the County Court of *Prince Edward*, stating that the testator of the appellants was indebted to the said *Sturgin* in the sum of 45*l.* and prayed for an attachment, and the usual order was made in Court, and endorsed upon the *subpœna*. The sheriff returned the *subpœna* executed on *Thomas Scott*, (one of the appellants,) and not found as to *John Watts*, (the other appellant,) and there was an order of publication against the defendant *Sturgin*, before the return-day of the *subpœna*, *but renewed* afterwards; and at *June* Court, 1805, the *attachment* which had been awarded against *Scott* was returned "a copy left," and the *subpœna* against *Watts* "no inhabitant," and thereupon the Court decreed, that as a due publication of the order appeared against the said *Sturgin*, and he not appearing, the appellee should re-

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cover against him the amount of the judgment aforesaid with costs; and as it also appeared that the testator of the appellants owed to the said *Sturgin* 45*l.* it was condemned in their hands to the payment of the appellees.

From this decree there was an appeal allowed upon the petition of the appellants. The cause was submitted.

By the Chancellor. To this decree there is an insuperable objection as to the appellants, as it was rendered against them *prematurely and unconditionally*, since they were not legally before the Court; for upon the return of the *attachment* against *Scott*, there should have been an *attachment with proclamation*, and upon the return thereof, if no answer had been put in, a decree *nisi* might have been entered, (1 *Rev. Code*, p. 90. s. 44, 45.) but which could not have been confirmed, until a copy thereof had been duly served on the appellants. And again, the decree should have been so entered as to have made the plaintiff give security for abiding such future order as the Court might make upon the appearance of the absent defendant at any time within seven years, as prescribed by law: (*Id.* 115.) nor should the whole sum of 45*l.* have been decreed to the appellee, unless it had been *less* than his demand; but as it was more, so much thereof as was equal to the demand, should have been decreed.

The decree as to the appellants was reversed with costs, and the cause retained to be proceeded in *de novo*.

M'Loud *against* Roberts *et al.*
and
Shore *against* Same.

In suits to subject to the payment of debts, lands in the possession of *heirs*, the constant course, where there is no *specific lien*, is, *first* to take an account of the *personal* assets.

THESE suits were brought to subject lands in possession of heirs, to the payment of their ancestor's debts, and

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now the counsel for the plaintiff moved for decrees to sell the lands.

By the Chancellor. The constant course of the Court is, never to decree a sale of lands, (supposing it to be proper,) in the possession of the *heirs*, to pay debts, unless the creditors *first* take an account of the *personal* assets, except there be a *specific lien*, on the lands, and therefore the Court can only order an account, at this time; which was done accordingly.

M'Rae *against* Farrow.

A conveyance of land by *two* out of *three* executors, all of whom qualified and were living, (the testator having directed the sale and conveyance by *his executors*, in general terms,) is not valid in *law*, and cannot be aided in *equity*: nor would the payment of the purchase-money, in such case, create any *lien* on the land.

IN this case these questions occurred: 1. Whether a conveyance by two of three executors, all of whom had qualified and were living, (the testator having directed the sale and conveyance to be made by *his executors*, in general terms,) was valid in *law*? 2. If it was not, could it be aided in *equity*? and, 3. If it could not, did the purchase-money, if paid, create a *lien* on the land, which would subject it in equity to the repayment of the money?

By the Chancellor. Upon the first question, I think the law was rightly settled *in this case*, in the old General Court, in *April*, 1774, that the conveyance was *not valid*, and the maxim is that *equity follows the law*: and, therefore, upon the second question, the plaintiff cannot be aided in this Court. And as to the third question, if the purchase-money was paid, it created no *lien* upon the land, because the plaintiff neither derived a *legal* nor an equitable right thereto: and he must be left to his remedy at law,

Ogg *against* Randolph *et al.*

The aid of a Court of equity is necessary and proper in assisting process of execution levied on tobacco in public warehouses.

THE bill in this case was filed to assist the plaintiff in executing his process of execution, which had been levied on some tobacco of the defendant *Randolph*'s, in one of the public warehouses, as there appeared to be a well founded apprehension, that he might demand his notes for the same, of the inspectors, who by law would be compelled to deliver them; and, therefore, an injunction for their indemnity was awarded, upon the condition that the plaintiff would consent to a sale of the tobacco, and a deposit of the proceeds in the bank. This was consented to. The defendant *Randolph*'s answer stated that a previous sale of all his goods, including the tobacco, had been made to *William Fleming*, to indemnify him as a security, and referred to the deed, which had but one witness to it, and was not recorded, nor was there any other proof of it than the affidavit of the witness thereto. The cause came on to be finally heard.

By the Chancellor. The deed not having been recorded as prescribed by law, as to creditors, is as to them, clearly void: the injunction must be made perpetual, and the plaintiff allowed to take the proceeds of the tobacco out of bank.

The defendant *Randolph* to pay costs.

Duguid *against* Patterson.

1. Practice of reviving against *resident* and *non-resident* defendants. 2. A report under an order made when the representatives of a deceased party were not before the Court, will be set aside.

IN 1805 this suit abated as to *Charles Patterson*, one of the principal defendants, and there was an order of publi-

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cation against his representatives who lived in *Kentucky*, in *March*, 1807. In *September* following, there was an additional order for an account. In *June* last, the suit was revived, and the cause now coming on, upon the report made in pursuance of the order of *September*, 1807, Mr. *Wickham* objected to the report, because the representatives of *Charles Patterson* were not then in Court; but Mr. *Williams* said the practice had been both ways; either to bring on the cause upon the order of publication, or to revive the suit upon that order, and then to bring it on.

By the Chancellor. This is the first time such a case has occurred before me; and if the practice has been as Mr. *Williams* states it, it was unauthorized, for when a suit abates against a *resident* party, it cannot be revived unless there is an appearance for him, or process returned executed, and then the order is made, and not before: and so with respect to a *non-resident* party, on whom process cannot be served, in lieu of which an order of publication is made, for two months in a public newspaper; and then, and not before, the suit should be revived; and then, and not before, it should be proceeded in: and, therefore, the last report in this case must be recommitted, as having been made under an order which was made when the representatives of *Charles Patterson* were not before the Court. The practice upon this point is now settled.

Campbell *against* Braxton *et al.*

A report, shewing a balance due from a defendant is not a sufficient ground for an order directing the money to be brought into Court. The plaintiff should proceed to a *decree* which he may enforce by the usual process.

THERE was a report in this case, which shewed a balance to be due by one of the defendants, as an executor, and Mr. *Randolph* moved for an order to direct him to bring the amount thereof into Court.

By the Chancellor. This cannot be done: you may proceed on to a decree, which you may enforce as in other like cases, by the usual process of the Court.

Campbell v. Braxton.

Motion denied.

Jones *against* Jones.

THE report in this case (which was a bill brought for an account) was in favour of the defendant, against whom a verdict and judgment had been rendered at law, in an action brought by him against the plaintiff, and the questions submitted to the Court were, 1. What should be the effect of the rule where, at law, or in equity, you take an account of one of the parties as evidence against him; and, 2. Whether the judgment at law, as above stated, should bar the defendant from a decree in his favour for the balance so reported.

1. Rule, as to taking the account of a party as evidence against him. 2. A verdict at law against a party is no bar to a decree in his favour if he is brought into Chancery by the adverse party; otherwise, if he were the plaintiff in equity.

By the Chancellor. As to the first question, the general rule of law is this, that where you take an account of one of the parties as evidence against him, you must admit it to be evidence for him: but this is only so far as the account itself would be evidence if it were proved by other means. For example, the account should not be *evidence*, so far as any error should be apparent on its face.

As to the second question: if the defendant had brought this suit, the judgment at law against him would be a clear bar; but as the suit is brought against him by his adversary, at law, the judgment is no bar.

Decree for the defendant.

Hill *against* Green.

Where a plea is set down for argument, the cause must be put on the Court docket.

WILLIAMS moved to take up this case upon the plea of the defendant. *The Chancellor* asked where the cause stood.

Mr. *Williams* said, at the *rules*; though the plea was set down with the clerk to be argued.

By the Chancellor. The plea should have been set down on the Court docket in order that it might have had its turn, which would have been notice to the adverse party; but to take it up *now* might be a surprise upon him. It may be docketed, but cannot be tried but by *consent* of parties: and so it was ordered accordingly.

Corbin *against* Beverley *and others.*

If a party have an account taken as to a subject before decided by the court, in the same cause, so much of the report will be at his own costs.

THE bill in this case was brought to *recover damages* on account of a contract respecting some tobacco, and to have an account of eight hogsheads, which account was, at a former hearing, directed, and the bill as to the damages thereby claimed, dismissed.

Commissioner *Greenhow*, after taking the account of the eight hogsheads, made a statement of better than three pages upon that part of the subject which had been decided upon by the Court, of which the Court, on that account, *disapproved*, and directed that $10 82 of the Commissioner's costs to be taxed for the plaintiff, should be excluded; so that he was made to bear the cost of *that part* of the report himself, as it appeared to have been done at his instance.

Williamson *against* Childress.

THIS suit had been dismissed after an order for an account. The plaintiff, nevertheless, went on with his account, and got a report made out and returned, and then moved for and obtained the reinstatement of this cause, which now came on to be heard.

A report made while a cause stood dismissed, and before it was reinstated, will be recommitted.

Mr. *Wickham* objected to the report, as evidence, because it was made after the dismission, and before the suit was reinstated.

Mr. *Randolph* contended, that if, in other respects, the report was right, it should not be objected to on that account; and more especially as part of the report had been made before the dismission.

By the Chancellor. The reinstatement of the cause only restored so much of the report as had been made out before the dismission of the suit; the report, therefore, must be recommitted: and, for very *obvious* objections, appearing upon the face of it, it was sent to another Commissioner.

Patton *against* Page.

THERE was a decree in this case in the Court below, to foreclose a mortgage against the devisee of the mortgagor.

A *mortgagee* cannot be compelled, in order to get hold of the mortgaged subject, to go into an account of the *personal* assets.

Mr. *Botts* moved for an appeal, upon the ground that the personal representative should have been a defendant, in order that he might have accounted for the personal assets.

Patton v. Page.

By the Chancellor. The mortgagee cannot be compelled, in order to get hold of the mortgaged subject, to go into an account of the assets: it would be against the constant course of the Court; and again, the decree is but *interlocutory.*

Appeal denied.

Wilkinson's Administrator *against* Oliver's Representatives.

Where an infant is decreed to *do any act,* he must have six months allowed him after he attains full age to shew cause against the decree: but where lands are decreed to be sold for the payment of debts, there is no necessity, unless he is directed to join in the conveyance, as the Commissioners will execute the deed.

THE question submitted to the Court, in this case, was, whether the decree, which was for the sale of some lands belonging to infants, to pay debts, should allow to them any time, after they came of age, to shew cause against it, as Commissioners were to conduct it.

By the Chancellor. Wherever an infant is decreed to do an act, he must have six months, after full age, allowed him to shew cause against the decree, as where he is *foreclosed.* But, where lands are decreed to be sold for the payment of debts, there is no necessity to allow a day, unless he is decreed to join in the conveyance, as the Commissioners of sale will execute the deed.

September term, 1809.

Read's Executor *against* Winston *et al.*

Objections for want of proof of any voucher, on which a Commissioner founds an item in his account, must generally be made before the Commissioner himself; in which case, if such proof be not supplied, it may be called for at the *hearing;* but in no other instance, unless for good cause shewn, and upon one month's previous notice.

THIS was a motion to dissolve the injunction, in this case, upon the coming in of the account which had been directed, and to which there were exceptions now put in for the first time; and the vouchers which had been exhibited before the Commissioners were called for.

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Read's Ex'r. v. Winston et al.

By the Chancellor. This practice (which has been but lately introduced) of calling for the vouchers of a party, and of putting him to the proof of them upon the trial, I perceive will lead to very great inconvenience if suffered to continue; and, therefore, it must be distinctly understood, that it cannot be allowed any longer, unless, where the objection, for the want of proof of any voucher, is made before the Commissioner, and not supplied before he makes out his report. In all such cases, proof of such vouchers, within the rule of Court, may be called for upon the trial; but in no other instance, unless for good cause shewn, and upon one month's previous notice thereof to the party, or his agent, or attorney in fact.

Injunction dissolved.

Hampton's Executors *against* Pollard.

September term, 1809.

THE motion in this case was for an account upon the evidence contained in the answer. The cause was at rules.

A motion for an *account* is irregular: it should be for a *decree*, which if the Court cannot enter without an account, it will direct one.

By the Chancellor. There is no such motion in a Court of Chancery as a motion for an account. The motion should be for a decree, which, if the Court cannot enter without an account, it will direct one.

Motion denied.

September term, 1809.

Wright *against* Wright *et al.*

Practice, where the appellees took possession of the property belonging to the intestate of the appellant, pending the suit.

THERE was an appeal from the County Court of *Amelia*, and it was stated and proved, that since the suit was commenced in the County Court, the appellees had taken possession of the negroes belonging to the estate of the intestate of the appellant who now applied to the Court to order restitution.

By the Chancellor. The following order may be entered: That, unless the appellees, or such of them as are in possession of the negroes, or any of them, belonging to the estate of the intestate of the appellant, enter into bond with a penalty equal to double the value of the said negroes in his, her, or their possession, with sufficient security, to be approved by *Joseph Eggleston* or *Samuel Ford*, of *Amelia* County, conditioned to save harmless, and to indemnify, the appellant against all debts that may come against his intestate, and to have the said negroes forthcoming to abide the future decree of this Court, the appellees, or such of them as may have any of the said negroes in his, her, or their possession, do deliver the same to the appellant.

September term, 1809.

Vaughan and Wife *against* Wilson.

In a suit by husband and wife, for the recovery of personal property in *her* right, if the husband dies, the right survives to *her*; and on her death, the suit should not be revived in the name of *his* administrator.

THE bill in this case was filed to recover some personal property in right of the wife, which she derived from her son, who died intestate, in *April*, 1787; her husband, the plaintiff, died, and then she died, and the suit was re-

vived upon the *abatement* thereof, in the name of *his administrator*. To this bill there was a demurrer.

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By the Chancellor. The demurrer is certainly good, as the right *survived* to the wife; and the plaintiff must pay costs. But the order awarding process to revive may be set aside, which will leave the suit *abated*, as the plaintiff prefers this course, and as it can make no difference with the defendant.

Lee *against* Baird *et al.*

September term, 1809.

A partner having withdrawn from a mercantile company, and being afterwards erroneously included in a suit against a new company formed by the other partners, may be relieved in equity against a judgment therein obtained, upon the ground that one of the company prevented his making defence at law, by assuring him the matter should be adjusted.

THE plaintiff was a member of a mercantile house in the County of *Cumberland*, trading under the firm of *Goodrich, Lee & Co.* and in *May*, 1801, they came to an agreement to continue in partnership until the end of that year, and then to be dissolved, which was publicly known in that part of the country. *Goodrich* and the other partner *Anderson*, then formed a *new* company, which was known by the name of *John B. Goodrich & Company*, and, in the latter end of the year 1801, *John B. Goodrich* applied to *James H. Baird*, of *Petersburg*, and obtained a credit in the name of *John B. Goodrich & Co.* for goods to the amount of 66*l.* 6*s.* 6*d.* for which they executed their bond in 1803; but *Baird* alleged that he sold the goods on the credit of the *plaintiff and the said Anderson*, as he was informed by *Joel Clark*, of *Prince Edward* County, that *they* were concerned with the said *Goodrich*. A suit was afterwards brought at law, against *Goodrich*, *Lee*, and *Anderson*, as late partners in trade, under the firm of *J. B. Goodrich & Co.* and, as *Lee* alleged, he made no defence, because *Anderson* assured him the matter should be adjusted; but it was not, and an execution was levied upon *Lee's* property; and in order to keep it, he gave a forthcoming bond, and then filed his bill in this Court for relief under

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these circumstances; and thereupon an injunction was awarded, and now the cause came on to be finally heard.

By the Chancellor. *Goodrich* and *Anderson* have not answered, and *James H. Baird* relies principally upon these two points: 1. That the *dissolution* of the partnership of *Goodrich, Lee and Co.* in 1801, was not known; and, 2. That the plaintiff might have defended himself at law. As to the first point, there would be much weight in the objection, if the fact were so, and the contract had been in the name of *Goodrich, Lee & Co.* but the fact was not so, and the contract was not in their names, but in the name of *John B. Goodrich & Co.* in which the plaintiff had no concern: and this too, after the dissolution in *May*, 1801.

As to the second point; it is not denied but that the plaintiff was *misled* by *Anderson*, and therefore did not defend himself at law: and, I confess, it is a very doubtful point, whether, on account of *Anderson's misconduct*, a legal advantage obtained by *Baird* at law, should be taken away: and, I am inclined to think that it should not, if the plaintiff had, in any manner, contributed to mislead *Baird*, or to place his claim in a worse situation; but he has not. In this case *he* is *faultless*. He comes into Court with clean hands; and if *Baird* and *Anderson* have not combined to oppress him, he has done nothing to injure either of them, as *Baird* has his judgment against *Goodrich* and *Anderson*, who are his proper debtors, and now occupies the same ground he did before he sued the plaintiff. This is not like the case of *Chisholm* against *Anthony*.(a) In that case *Chisholm* availed himself of all the *delays* of the law, and when he could no longer thwart *Anthony*, he *then* came here for relief, which was denied, as he applied with *unclean* hands; and as the real debtor might in that time have become insolvent. Nor is this like the case of *Nicholson* and *Heth* against *Hancocke* and *Gilliat*; as in that case the plaintiffs were the real debtors, and might have controlled the advice which kept them from making their

(a) 2 *Hen. & Munf.* p. 13.

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defence at law, and therefore they should have done it. But, in *this* case, the plaintiff never was the debtor of *Baird*, and most clearly was *deceived* by *Anderson*, on whom the plaintiff *relied* to pay the debt, and therefore he expected to hear no more of it, and so went undefended. Nay, it was a circumstance which, as he relied upon it, he could not *control*, until it was too late: and, therefore, his case forms an exception to the general rule, and the injunction must be made perpetual as to *Lee*, at the costs of *Goodrich* and *Anderson*, against whom *Baird* may still proceed at law, unless they can shew cause against it at the term after they shall be served with a copy of the decree.

Saunders *against* Marshall *et al.*

IN *December*, 1801, *Austin & Anderson*, as merchants and partners, made their note for 444*l.* 13*s.* 6*d.* payable to *Gibson & Jefferson*, who assigned it without recourse on them to *Samuel H. Saunders*, who, in *September*, 1803, assigned it to *Robert H. Saunders*, and agreed to *guaranty* the same, if the makers should prove insufficient. In the mean time, to wit, in *August*, 1802, the makers of the note conveyed to certain trustees, all their estate, real and personal, both in law and equity, for the benefit of their subscribing creditors: and, there being no prospect of getting any thing out of the makers of the note by a suit at law, the plaintiff brought his action against his assignor, in the County Court of *Henrico*; and upon the trial of the same, the defendant, in that Court, moved the Court to instruct the Jury, that the plaintiff was bound to bring an action against the makers of the note before he sued the defendant, although the plaintiff proved, beyond all doubt, that they were insolvent: yet the Court gave the instruc-

1. The assignee of a bond or note is not bound to sue the maker, if he be *notoriously insolvent*, before he can resort to the assignor.

2. If a party prosecute his action at law, and there be a decision of an inferior Court against him, from which he takes an appeal, but does not prosecute it, he cannot come into equity for relief, on the same subject matter.

How far a judgment at law is a *bar* to a subsequent suit at law or in equity, against the party in whose favour such judgment was rendered.

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tion, to which there was an exception, and a verdict and judgment was rendered for the defendant, from which the plaintiff prayed an appeal; but (without prosecuting the same) filed his bill in this Court, to be let into the trust fund in the hands of the trustees, for whatever could be obtained from them, and to compel the assignor to pay the balance, notwithstanding the judgment at law in his favour. To this bill he *demurred*, because of that judgment, on which he relied as a *bar*; there was a *joinder* in demurrer, and the question submitted to the Court was as to the effect of the demurrer.

By the Chancellor. The plaintiff had his election, in the first instance, to commence his action at law, or to come into equity for his proportion of the surplus of the trust fund; and, if he had preferred the latter, no objection could have been made to the jurisdiction of the Court; but, as he preferred the former, he is bound by its consequences; and this makes it necessary to inquire, 1. Whether he was bound, under the peculiar circumstances of this case, to sue the makers of the note at law before he could sue the assignor; 2. If he was *not*, whether he should not then have prosecuted his appeal; and, 3. If he was, whether he might still come into equity, notwithstanding the judgment. As to the first question, it is true that ever since the case of *Mackies* against *Davis*, 2 *Wash.* 219. the general rule of law has been understood to be, *that the maker of an assigned bond must be sued before the assignee.* And so with respect to *notes* ever since the case of *Lee* against *Love & Co.* 1 *Call*, 499.: but I understand this only as a *general rule*, growing out of the nature of the transaction, that the assignee of a note or bond, takes it upon this implied condition, that he will look to the maker in the first instance, in the same manner as the promisee or obligee would have done; and, therefore, the general rule does not require that the *assignee* should do more than a

diligent promisee or obligee might be expected to do: and hence, if the maker of a note or bond be so *notoriously insolvent*, that a *diligent* promisee or obligee would not probably bring a suit against him, why should the *assignee?* Surely he should not, as it would be to the *injury* of the *assignor*, by subjecting him to the costs occasioned thereby; and might be very *injurious* to the *assignee*, if the *assignor* in the mean time should become *insolvent:* so that I hold it to be the law, that as the object of the suit by the assignee against the maker of a note or bond, is to ascertain his *ability* to pay the money; that if his *inability* can be ascertained, to every reasonable certainty, by any other means, there is no necessity of a suit against him, and recourse may be had, in the first instance, under such circumstances, to the *assignor*. As in this case: the plaintiff proved, by a deed regularly recorded, in *November*, 1802, that *Austin and Anderson* had made a conveyance of all their property, for the benefit of their subscribing creditors: and he also proved, that neither he nor the defendant had subscribed; that *Austin and Anderson* had not paid one single instalment; that the whole of their property would not pay 6*s.* 8*d.* in the pound of their debts to the subscribing creditors; that *Austin* had not been in any employment by which he could have made any thing to pay new subscribing creditors; and that *Anderson* was *notoriously insolvent*, and in the *Penitentiary* of *Philadelphia:* yet the County Court said, that this proof of the inability of the makers of the note was not sufficient, and that nothing less than a judgment against them, and an execution returned *nulla bona* would do; but in this that Court certainly erred, and the question was very correctly saved by a bill of exceptions, upon which the Superior Court of Law must decide, and there can be no doubt as to what that decision will be; for the Court where the law is settled in the last resort is not understood to have said, that nothing *less* than an execution returned *nulla bona* will do to prove

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the *inability* of the maker, but that that is sufficient; still leaving every case to stand upon its own circumstances: and, I am clearly of opinion, that the circumstances in this case, furnish as unequivocal proof of the *insufficiency* of the makers to pay, as the return of an execution *nulla bona* would do; for, at no period since the assignment in *September*, 1803, could an execution of any kind against the makers, have produced any thing; and, on that account, the *assignor* should be held to his guaranty of the note. And, therefore, as to the second point, upon the authority of *Terrell* against *Dick*, 1 *Call*, 546. the plaintiff should have prosecuted his appeal at law, and upon that ground, should not have brought the present bill. And as to the third point, from what has been said, there is no necessity to decide it; but, as it was discussed by counsel, and I have examined the subject, it may save time hereafter, to settle it now. The law is, that by matter of record all parties are estopped, so that a man shall not be allowed to make an averment contrary to a record: and, if a deed be enrolled of record, the party is estopped to say that it is not his deed, or that it was not acknowledged by him; but when the truth is apparent on the record, the adverse party shall not be estopped to take advantage thereof, for he cannot be estopped to allege the truth when it appears of record. So that where the record is general, and does not disclose the ground of decision, the *bar* created thereby is as general; but where the record leads to the ground of decision, it is no farther a *bar*, than as to that ground; for that is all that has been decided, and so far, and no farther, it is a bar; as for example: if the law was, as decided by the County Court, that in no case could the *assignor* be sued, without a suit first against the maker, and a return upon a *fieri facias* of *nulla bona*, this decision would be a bar to another action against the *assignor*, before a suit against the *makers;* but it would be no bar to a suit against *them*, nor afterwards to a suit against the *assignor*; and

therefore, if the plaintiff's remedy was not at *law*, his bill might be entertained in *equity*, notwithstanding the judgment. Saunders v. Marshall et al.

The bill would have been dismissed, but the parties agreed.

Pollard *et al. against* Underwood *et al.*

IN this case it appeared, that *Nathaniel West Dandridge* had mortgaged 618 acres of land, whereon he lived, in which his widow, the wife of *Underwood*, had a life estate, and *William Dandridge* the remainder in fee; and that the same was sold under a decree of the Federal Court, to satisfy the mortgage, for 401 dollars and 91 cents; on the 14th *September*, 1802, and purchased in by the said *Underwood*: and the principal question was, as to the proportion of the 401 dollars and 91 cents, which *William Dandridge* should account for.

A Jury directed to ascertain what proportion the value of a dower estate bore to that in remainder; (where the land had been sold under a decree to foreclose a mortgage;) and the sum found by the Jury decreed to the tenant in dower.

By the Chancellor. Whatever proportion *William Dandridge's* remainder bore to Mrs. *Underwood's* life estate, on the day of sale, he should account for; to ascertain which, a Jury will be directed to value the land on that day, as well as her life estate in the same. And so it was ordered and decreed accordingly.

Haydon *against* Goode *et al.*

1. A *simple contract* creditor shall receive out of the *real* assets descended to the heirs at law as much as has been paid to *bond* creditors out of the *personal assets.*

2. The plaintiff being both *heir* and *administrator*, and seeking to be relieved as administrator, will not be entitled to such relief, unless he will do equity as *heir.*

3. An heir is not bound for *Clerk's fees* and *taxes* due from the *ancestor.*

4. An injunction in favour of an executor or administrator on the ground of a deficiency of assets, should not be *perpetual*; but only until assets shall come to his hands to satisfy the judgment, or any part thereof; reserving to the creditor liberty to shew such assets by a *scire facias* at law.

THE plaintiff was both *heir* and *administrator* of the same intestate, and, in the latter character, brought his bill to be relieved against several judgments at law. The case was upon a former hearing referred to one of the Commissioners of the Court, and he reported that the plaintiff had, out of the personal assets, paid some of the *bond* creditors, and was in possession of real assets to a much greater amount. Among the debts which bound the heir, the Commissioner included some *Clerk's fees* and *taxes*: and now the cause came on to be heard, and these questions were submitted by the counsel:

1. Is the plaintiff entitled to relief without doing justice in both characters? and,

2. Is the *heir* bound *for Clerk's fees and taxes?*

By the Chancellor. As to the first question, it is a well settled principle, that *simple contract* creditors shall receive out of the *real assets*, as much as has been paid to *bond* creditors out of the *personal assets*; and, as the plaintiff is asking equity, he must do it; and upon this *maxim*, he shall not be relieved as the *administrator* of the intestate, until, as *heir*, he shall also do what is right, without turning the defendants round to either a cross-bill or another suit. Upon payment, therefore, of so much to the defendants, (as simple contract creditors,) as was paid to the bond creditors out of the personal assets, the injunction, as to the balance of the defendant *Burtis's* judgment, may be continued until *assets* shall come to the hands of the plaintiff, sufficient to pay the same, or any part thereof, which the said *Burtis* may be at liberty to shew, at any time hereafter, by a *scire facias* at law for that purpose. (*Vide Netherland et al.* against *Ronald's Administrator.* The Court of Appeals in that case said, that there was error in

the decree of this Court, as pronounced by the former Chancellor; in awarding a *perpetual injunction* to the judgment which was enjoined, instead of permitting the appellant to proceed thereon, upon future assets, if any accrued beyond the balance then in hand. *MS. Co. Ap.*) And as to the second question, it is clear, that for *Clerk's fees and taxes*, the *heir* is not bound: and therefore, such claims should not have been placed with bond creditors. N. B. There were but two simple contract creditors, one of whom had a judgment against the plaintiff for a *devastavit*, and he was allowed to be first paid on that account.

Haydon v. Goode et al.

Ronald *against* Bentley *et al.* *and* Harmer *against* Key.

IN these cases, on motion of the plaintiffs respectively, by counsel, for a rule in the former case, on the deputy-sheriff of *Powhatan* County, and in the latter case on the deputy-sheriff of *Albemarle* County, to shew cause, at the next term, why they should not be severally attached for not executing and returning, in due time, the process of this Court, which had been delivered to them for that purpose.

A Sheriff is liable to the action of the party at common law, for not executing and returning the process of this Court.

But *qnere*, whether he is liable to *attachment*?

The Chancellor said, that he would make the rule, that the power of the Court might be inquired into; but that he should not now decide, whether the plaintiffs would be entitled to an attachment in case no cause should be shewn; but that it was very clear, the sheriffs were liable to the action of the plaintiffs at common law, and although there were many cases in which sheriffs might be attached; yet, whether these were of that description would be left open to investigation.

The rule was made returnable to the next term.

Webb *against* Barbour: Two Cases.

Quære, whether a *mandamus* lies from this Court to a County Court, compelling the justices to hear and determine a cause, where there appears to have been unreasonable delay?

THE plaintiff, by counsel, moved for a rule upon the Justices of the County Court of *Orange*, where the causes were depending, to shew cause, at the next term, why a *mandamus* should not go commanding them to hear and decide upon the rights of the parties therein; alleging that the said County Court had refused to do so, and that their refusal had been so often repeated, that it amounted to a denial of justice.

The Chancellor said, that the motion involved in its consequences many weighty considerations: that he was not ready to say, admitting the facts, that the Court would exercise such a power. But, from the circumstances stated and proved, he would make the rule, that, upon the return of it, the subject might come fairly before the Court. He hoped, however, that the County Court was not less disposed than himself, to discharge, as speedily as possible, in the order of their docket, the public trust confided to their hands; for, certainly, said he, nothing could contribute more to the honor and justice of the country, than a speedy determination of controversies, at law or in equity.

And so the rule was made returnable to the first day of the next term.

Marks *against* Morris.

THE bill in this case was brought to be relieved against a usurious contract, covered by two deeds of trust, which the trustee was about to carry into effect by making a sale of the property thereby conveyed; praying a *discovery* of the usury, and for an injunction to stop the sale, which was awarded.

1. In cases of usury, the borrower filing his bill in *equity* is entitled to relief, not against the contract *entirely*, but to the amount *of all but the principal money*, the lender being entitled to receive his *principal, without any interest*.

The usury was not *admitted* by the answer, nor was it *positively denied:* but, from the terms of the answer, and the testimony in the cause, the usury, beyond all doubt, was made to appear. This cause was twice argued, with very great ability by all the counsel, and the principal question submitted to the Court, was, whether the plaintiff should be relieved against the contract entirely, or against all but the principal money.

2. In such cases, though relief be given against the *interest*, the usurious assurances remain as a security for the *principal;* and the Court will direct them to be enforced to that extent, if it be not paid by a given day.

By the Chancellor. I have devoted much time to this case; and, I confess, that when a motion was formerly made to dissolve the injunction, I thought differently from what I do now; but surely I was under an erroneous impression, and I now take much pleasure in receding from it. It is not my habit to take up much time in Court in delivering my opinions, as I deem *time* of more importance than *words* to the suitors: otherwise, upon this subject, I could write a volume; and, while I have not less respect for *English* Judges and *English* opinions, than other gentlemen; yet I have too much regard for myself, and the national character of my country, to rely upon *English* books, farther than for *information* merely, but not as *authority:* it was the *common law* we adopted, and not *English decisions;* and we should take the standard of that law, namely, that we would live honestly, should hurt nobody, and should render to every one his due, for our judicial guide. By this standard then, let this cause be adjusted; to do which, we must understand what was the former

3. *English* decisions are regarded by this Court, for the sake of *information merely*, but not as *authority*.

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rule, upon coming into equity, in a case like the present. Before the third section of our present act against usury(*a*) was introduced into our laws, the rule with respect to relief in equity against a usurious contract was this; that if the borrower brought a bill in chancery against the lender, to compel him to discover the usury, he might demur, because it subjected him to a penalty; and no one, upon principles of natural and universal justice, could be compelled to subject himself. In order, therefore, to compel a discovery of the usury, the borrower had to waive the penalty, and to offer payment of the principal money, with legal interest, and then the lender was compelled to answer and make the discovery, upon which relief was afforded against the *illegal interest*, upon this maxim, that he who seeks equity, must do it. But the third section in our act declares, that a borrower may exhibit his bill in equity against the lender, and compel him to discover, on oath, all the circumstances in relation to that transaction, and if, thereupon, it shall appear, that more than lawful interest was reserved, he shall be obliged to accept his principal money, without any interest or other consideration, and pay costs; but shall be discharged of all other penalties of that act. The difference then between the former and the present rule, is this; that, by the former, relief in equity could be only obtained upon doing complete justice, by paying the principal money and legal interest; but by the latter, it may be obtained upon payment of the principal money without interest. But I understand the counsel for the defendant to contend, that he is entitled to the full benefit of the *former* rule, unless the case falls expressly within the *latter*, as the discovery of the usury was not made by his answer, but proved upon him. But, as well the former, as the present rule, was predicated upon the ground, that there was no relief at law: and surely it never was intended to preclude a borrower from relief in equity, if, from circumstances which he could not control, he was prevented from making his defence at law; and then

(*a*) 1 *Rev. Code*, p 37.

whether upon the latter, or the former ground, if relief in equity should be asked, the rule in both cases should be the same; for I apprehend that the legislature did not mean to place the lender who should not make the discovery, in a better situation than the one who should make it. For example, a bill for relief is filed; the defendant, the lender, in his answer, admits the allegations of the bill to be true; then he shall be obliged to accept his principal money, without any interest, pay costs, and be discharged of all other penalties imposed by the act. But, if he had evaded the truth, though the usury should be proved upon him, he should, as I understand the counsel, be entitled to his principal money and legal interest, agreeably to the *former* rule; it not being a case expressly within the *latter*, as prescribed by the third section of the act. But this cannot be a fair exposition of the legislative will, as it would be an inducement to every lender, to withhold a fair disclosure of facts: upon *this* calculation, "if they are disclosed, I lose *all* my interest, but if they are not *disclosed*, though they may be *proved*, I shall get *lawful interest;* and, if they are not *proved*, I get my lawful and unlawful gain:" but when the lender is, in either case, to lose *all* his interest, whether upon his *discovery* of the usury, or upon the plaintiff's proof, there is no inducement held out to him, to withhold the truth.

One word upon the main pillar of Mr. *Hay's* argument, "that the plaintiff was operated upon by the effect of the deeds of trust, and, having had no day in a Court of Law, was compelled to come into this Court, for he could go no where else." This is true, and, under the operation of these deeds, the plaintiff was placed precisely in the situation of a man against whom there is a judgment at law, upon a usurious bond, because he and his witnesses were all sick, and could not attend the trial, and therefore a judgment was rendered against him. Now this man must pay the usury, in the judgment, unless he can be relieved in equity; and

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there is no doubt about it. And so with respect to the present plaintiff; his property was to have passed off under the hammer of the cryer, but for the interposing hand of this Court. He is then the applicant here for relief, to which he is most clearly entitled; but the question is, as to the extent of that relief. The answer is, that he must do justice, so far as the law will authorize it, in order to obtain it; and therefore he must pay the principal money without any interest; and the defendant must be deprived of all *gain* by the contract, which was corrupted by the usury, pay costs, and stand discharged from all other penalties of the act.

The decree may be to this effect:

That if the plaintiff shall pay to the defendant so much of 2,500 dollars, being the principal money, without interest, as shall remain after deducting all costs, and 129 dollars, (acknowledged to have been received,) on or before the first of *October* next, the injunction may be made perpetual, and the deeds of trust, and a note for 95 dollars, in the bill mentioned, are to be delivered up to be cancelled, and the defendant to be discharged of all other penalties imposed by the act. But if such payment be not made, then the injunction for so much of the principal, as shall remain aforesaid, shall stand dissolved as an act of this day, and the deeds remain as a security for the same, and *Charles Copland*, Esq. may be appointed a Commissioner to proceed agreeably to the terms of the deeds, to raise the amount thereof, and to report the proceedings to the Court in order to a final decree.

To this decree, Mr. *Hay* objected, and referred the Court to many precedents in the *English* books.

Curia advisare vult.

On the next day,

By the Chancellor. The *principle* in this case is settled. *Marks* is relieved against the hardship of the contract, but

Morris is to take his principal money without interest, pay costs, and be discharged of all other penalties imposed by the act.

The question now is, as to the *form* of the decree, about which there would be no difficulty, if *Marks's* counsel had not intimated a disposition to get out of Court, in order to occupy his legal stand again; to prevent which, when the Court said, the deeds in the bill mentioned might stand as a security for the principal money, it was objected as a solecism, that deeds void by law should be set up in equity; and in support of this objection, the Court has been referred to *Vernon*, *Precedents in Chancery*, *Atkyns*, *Brown*, and *Fonblanque*. Let these books be examined in their chronological order: and first,

1 *Vern.* 467. *Bell* v. *Price*. The bill in that case was filed to be relieved against several securities for goods sold at five for one, and the Court is reported to have said, that the plaintiff's security should be delivered up, on payment of what was really and *bona fide* paid to him.

2. The *Precedents in Chancery*, 80. *Smith* v. *Soader*. The bill in that case was to be relieved against a recognisance for a much larger sum than had been advanced; and the Master of the Rolls decreed a perpetual injunction, upon the payment of the principal money and interest, and the Chancellor affirmed the decree.

3. 3 *Atkyns*, 287. *Lawley* v. *Hooper*. And, although the Chancellor, in that case, thought the transaction a shift to avoid the statutes of usury, yet, he said, there was no necessity to determine that point, and decreed relief on certain terms specified in the decree, upon the ground that the agreement, though for an absolute sale, was such as a Court of Equity should not suffer: and by the decree it was provided, that if the terms were refused, the bill should be dismissed.

4. 1 *Bro.* 398. *Lowther* v. *The Countess Dowager of Andover et al.*; where the bill was filed for a specific per-

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formance of certain articles, and the Court said, that, if upon a tender of a sufficient conveyance, the money was not paid, the plaintiff's bill should be dismissed.

5. 4 *Bro.* 439. *Mason* v. *Gardenier;* where the question was, whether a bill, for the discovery of the usury, without stating that the plaintiff was ready to pay principal and interest upon demurrer, was good, and could be entertained: and the Chancellor said it was not.

6. 1 *Fonb.;* where it is laid down, that the court will attend to the claims of equal justice, and will never interfere, unless the plaintiff will consent to do that which is right. I understand that the object of the plaintiff's counsel in referring the Court to those cases, was to prove that, where relief is afforded upon terms, the party, who obtains it, is at liberty to accept of the terms or not; and this is admitted, *so far as the relief goes, and no farther:* then how far does the relief go in this case? To all but the principal money; and the Court will not compel the plaintiff to accept of its relief; for, if he pleases, he may pay the usury; but the Court will put it in his power not to do it; and this is all the Court can do as to the relief: but the question is as to the principal money? Shall *Marks* have the aid of the Court, and not *Morris?* Shall the Court not aid *Morris* in getting from *Marks* that which he may withhold? Or, shall the Court suffer *Marks* to go out protected against the *usury*, and put *Morris* to his action at law for the *principal?* Would this be right, while both are here, and, according to *Fonblanque*, entitled to equal justice? I think not. In the cases to which I have been referred, there was no necessity for the Court to go farther than it did: because, the agreements were all good at law, and the defendants in equity were to be benefited, if the plaintiffs refused the terms on which they were relieved; and therefore the defendants did not object; for it was their interest to be at law; "but," says *Morris*, "this is not my case: a Court of Law will not do for me; you have said my deeds are tainted with usury, and that, if *Marks* will pay me 2,000

dollars, my securities shall be cancelled; but if he will not, how am I to get that sum? Must I sue him? If I do, he pleads the usury, and proves it upon me, by your decree: so that, although law and equity says, I am to have my principal money, without interest, pay costs, and be discharged of all other penalties; yet equity will not help me, while it relieves *Marks!*" It is this view which *Morris* is made to take of his own case, that makes it the duty of the Court to provide for *him*, as well as for *Marks*: for surely, it will be a *solecism*, to say that the contract is so far legal and equitable, that the principal money shall be paid, but the deeds, by which such principal is secured, shall not be set up in equity, to secure the payment of that principal which the act compels the lender to take: I think they may; and so said the *English* Chancellor in the case of *Scott* v. *Nesbitt*. It is true, that that was the case of a *judgment*, which, the Chancellor said, could only be displaced upon doing what was right, and that the judgment should stand as a security for the money actually paid with legal interest; and all Mr. *Hay's* arguments went to prove, in this very case, that *Marks* occupied a ground on which, at law, there was no relief. Between *Marks* then, and a judgment debtor, no difference is discerned; and, if the principle laid down, by the judge, in *Scott* against *Nesbitt*, was correct with respect to a *judgment*, it must be equally so with respect to the *deeds* in this case; and, more especially, as it may prevent another contest, which this Court should not be the means of producing, while it holds in its own hands the means of preventing it. But it is said, the Chancellor in *Scott* against *Nesbitt* did not understand the case: how this was I do not know; but, if he did not, he guessed well, for he struck upon the only principle that secured equal justice to the parties, while he relieved against the hardships of the case at the same time. But, if *he* had not done it, *I* would: my predecessor did it in *Hill* and *Hook*; and I shall do it in the case before me.

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I am perfectly satisfied with the frame of the decree delivered out on yesterday, conformably to which the clerk may draw it up and have it entered.

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Alderson *against* Biggars and others.

1. The proper line of demarcation between the jurisdictions of courts of *law*, and *equity*.

2. If the plaintiff obtain a judgment in detinue for slaves, and their profits to the rendition of the judgment, he can not come into *equity* for the profits which afterwards accrued pending an appeal; nor to recover their increase not included in such judgment; nor to compel the delivery of them by purchasers from the defendant.

THE plaintiff in an action of detinue, recovered of the defendant *Biggars*, seven negroes by name, and 50*l.* damages and costs; from which there was an appeal, which went to the Court of Appeals, where the judgment of the Court below was affirmed: to enforce which the plaintiff issued a *distringas ca. sa.* directed to the sheriff of *Prince Edward* County.

Biggars, to avoid the delivery of the negroes, while the deputy-sheriff held the process, sold them to the other defendants (except the deputy-sheriff who purchased, knowing the circumstances; and the deputy-sheriff, in satisfaction of the process aforesaid, received the prices of the negroes, as fixed by the verdict of the Jury as well as the damages and costs.

And this bill was brought to set aside the sales, and to recover the negroes, and their hires since the verdict at law; as also another negro who was born in the mean time, as also the money received by the deputy-sheriff for the damages and costs.

The defendants by *plea*, objected to the jurisdiction of the Court.

By the Chancellor. If the law affords an adequate remedy in this case, the application to this Court is improper; but if the law does not, this is, then, the proper Court.

The counsel differed upon this subject. But I will not indulge a belief, that the geographical situation of counsel can have any influence upon their judgments, with respect to the jurisdiction of either Court; but, be this as it may,

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the Court must act upon principle: and here let me premise, that a Court of *Chancery* should, to be really useful to the people, confine itself to those cases where a party is without remedy, or relief, at *law*, unless, from circumstances, (which, *if true*, could not be controlled,) he was unable to make his defence at law: because it is obvious to my mind, and must be to all those who know any thing about the mode of proof, and of trial, in the two Courts, that the difference is greatly in favour of a *common law trial:* for *there*, justice can scarcely ever fail: because, the parties, the witnesses, the Jury, and a disinterested Court are, or may be, looking at each other, at the same time; and the smallest deviation in a witness, can be detected, in a cross-examination upon the spot: nay, to *see* a witness, is often of more importance, than to *hear* him; for his *looks* sometimes conduct our senses to a conclusion, which his *words* would not: but, in *this Court*, the parties and their witnesses are only known upon paper; and injustice, more or less, on that account, must be in almost every sentence.

When the Court of Chancery first took its rise, it was upon those principles: but the power of the Court resting generally in the hands of an *individual*, the Court has gradually been encroaching upon the common law Courts, until, it would really seem, that it now claims jurisdiction, in common, with those Courts, in all cases whatsoever: such is the effect of power in the hands of an individual. But the true course for a Chancellor is never to interpose, if the matter can be adjusted at law: and the best interest of the people requires, that this rule should be adhered to: and more especially in a *republic* like ours, where, if the science of free government is not better understood, in *theory*, than in other countries, it is in *practice;* and of this, we proudly boast: and the fathers of their country have recorded in the sacred declaration of our rights, "*that, in controversies respecting property, and in suits between man and man, the ancient trial by Jury, is preferable to any other, and ought to be held sacred.*" All must agree, that

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it is one of the first duties of the magistrate to do his part in the preservation of this grand feature, in our sublime CONSTITUTION. And, therefore, as we all know, that our County Courts, generally speaking, are composed of the most respectable citizens among us, and our Superior Courts of Law filled with gentlemen not less distinguished for their morals, than for their talents; that, if parties will *attend* to their rights, in those Courts, and should not, from any material circumstance, be able to obtain justice, on the *first* trial, *another* may be had, before the same tribunal; there must, *after this*, be but little pretence for coming into *equity*; but, if in those Courts, the parties *will not* attend to their rights, they may by their own negligence, close the door of equity against themselves for ever: and so I understand the Court of Appeals, in the case of *Terrell* against *Dick*, 1 *Call*, 546. and in *Turpin* against *Thomas*, 2 *Hen. & Munf.* 139.

These cases deserve attention: they appear to me, to reinstate, upon correct principles, the original line between the Courts of Common Law and Chancery, which, if not blotted out, was much impaired by the decision in *Barret* v. *Floyd*, in the year 1790, 3 *Call*, 531. and all that class of cases which followed upon like principles, but which I now consider as overruled by the principles laid down in the cases before cited, of *Terrell* v. *Dick*, and *Turpin* v. *Thomas*, which I shall take for my guide.

It may be a great self-denial for some men to refuse themselves the exercise of a power, of which they have so many examples; but my mind is differently organized: and my impressions are, that every public character should pursue the dictates of his own deliberate judgment, adhering to the constitution, and conforming to the laws, and acting for the best interest of the country, at all times, without being under the influence of any personal consideration whatsoever. With these preliminary remarks, I shall proceed to examine the plaintiff's case.

At law he recovered all the negroes in controversy that

were then in being, and after going through two appellate Courts, with like success, he issued his execution, which was thwarted by the defendants; but this should not subject them to a suit *in this Court:* because it was, and still is, perfectly in the power of the plaintiff to obtain a due execution of the common law process, necessary to enforce his judgment, without the aid of this Court: for there can be no doubt, but that the Court of Law would, as it still will, see to the due execution of its own process, and not suffer it to be abused. The plaintiff then might have asked leave, as he still may, to quash the writ of *distringas* only; and he might, as he still may, either by a rule of Court, or by a *scire facias* at law, obtain an order for the identical negroes in the hands of the purchasers, without going through all the tedious forms of the law again. And, as to their hires since the verdict at law, in the County Court, I shall only say, that if the plaintiff is entitled to any thing on that account, an action at law is the proper remedy: and so with respect to the negro born since the judgment.

I shall not say any thing as to the damages and costs, as the amount thereof is acknowledged by the plaintiff to have been received.

It is also unnecessary to say how far, to avoid circuity of action at law, a party might be justified in applying here: since it would have been much cheaper for these parties to have had two suits at law in their own neighbourhood, than one here: upon the whole, it appears to me that the plaintiff's remedy at law was too free from any difficulty to have made it necessary for him to come into equity.

But, one word as to the mode of excepting to the jurisdiction of the Court: it should have been by *demurrer*, and not by *plea*.

The distinction is this; that where the objection to the jurisdiction of the Court appears on the face of the bill itself, the proper mode of defence is by *demurrer*; but where it does not, the objection should be made by *plea*: but this is mere form, and makes no difference, since the

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objection might have been taken at the bar; as it may in all cases where it would be proper by *demurrer*: and so it has been ruled on several occasions in this Court since my time, and lately confirmed in the Court of Appeals, in the case of *Pollard* v. *Patterson's Administrators*, 3 *Hen. & Munf.* 67.

Bill dismissed.

September term, 1809.

Wingfield *against* Crenshaw.

A Court of *Equity* ought not to interpose in the case of a nuisance, except where the *law* would not afford an immediate nor an adequate remedy until irreparable injury might be done.

THE defendant was the owner of a grist mill on *South-anna* river in *Hanover* County, and the plaintiff applied to the Court of that County in 1803, for leave to build a mill on the same river, above the defendant's; and the defendant applied for leave to raise his dam; and while their applications were depending, the defendant raised his dam two feet, to the prejudice of the plaintiff, who filed this bill, in which he stated, that the water was thrown back upon his plantation, which affected the health of his family, and covered his mill-seat fourteen inches, which was done to prevent him from building a mill; and prayed for the *abatement* of the nuisance, and for an *injunction* to prevent the defendant, in the mean time, from the use of the water. The Court at first denied the motion; but afterwards made a rule upon the defendant, to shew cause against granting the injunction.

By the Chancellor. It is agreed upon both hands, that the plaintiff has a suit at law against the defendant about this very matter; and I am very clearly of opinion, from every thing which I have seen, that these parties are before the proper tribunal: for although this Court might interfere, in the case of a *nuisance* where there is a flagrant violation of private right, attended with public injury, when the law would neither afford an immediate nor an adequate remedy until *irreparable* injury might be done, yet this is not one of those cases. For this reason, the rule must be discharged.

Anderson *against* Anderson *et al.*

September term, 1809.

A creditor admitted a party plaintiff for the purpose of obtaining a proportion of an equitable fund, may, on filing his bill, *at once* prove his claim before a Commissioner, (to whom the subject generally has been referred,) without waiting until the cause, as to him, shall have been set for hearing in the usual course of the Court.

IN this case, the only question made at the bar was, whether a creditor could be allowed to prove his debt, before the Commissioner, upon filing his bill for that purpose, and before the cause, as to him, was set for hearing, in the regular course of the Court, as to other suits.

By the Chancellor. The creditors of *Richard Anderson* are entitled to the proceeds of his estate, in the hands of the Commissioners, who made sale of the same, under a former decree of this Court, since which several creditors have been admitted as plaintiffs, upon filing their bills, and agreeing to contribute to the expenses of the suit: they are all equally interested in having a speedy report from the Commissioner, attended with as little expense as possible; and, as there can be no doubt but that in a scuffle among creditors about funds, they will sufficiently guard the interests of each other, I conceive that this case forms an exception to every other class of cases, and that a creditor, under such circumstances, may at once go before the Commissioner, and have his claim stated, subject to exceptions, as in other cases.

Rose *against* King.

September term, 1809.

After special demurrer to a bill, the plaintiff may have leave to amend, on payment of costs.

TO the bill in this case there was a *special demurrer*, which the Court inclined to consider as sufficient, and the plaintiff moved for leave to amend his bill in order to remove the objection, to which *The Chancellor* said there could be no objection, upon payment of costs; and so it was ordered accordingly.

September term, 1809. *See post.*

Johnston *against* Bower *et al.*

Practice, where the plaintiff is proceeding in this Court, and on the equity side of a County Court, for the same cause of action.

BOTTS moved, in this case, for a rule upon the plaintiff to show cause why a suit brought by the plaintiff on the Chancery side of the County Court of *Prince William* against the defendants, for the same cause of action, should not be dismissed in that Court, if the plaintiff preferred prosecuting his suit in this Court, and so *vice versa*.

By the Chancellor. The rule may be made in order to settle the practice.

September term, 1809.

Anonymous.

On a bill taken *as confessed*, the plaintiff cannot obtain a *final* decree, without filing his documents, and proving his case.

IN several causes, during the present term, where the bills had been taken *as confessed*, final decrees were moved for, without proof in some of the causes, and without the documents referred to by the bills in some others: and whether, under such circumstances, decrees could be entered, was the question of which the Court took time to consider; and now,

By the Chancellor. At law, if a defendant makes *default*, in any action of debt, founded upon a bond, single bill, promissory note, or other writing, signed by himself, for the payment of money or tobacco, judgment may be entered thereupon for the same with interest; but if the bond, bill, note, or other writing be not filed, no judgment can be entered; and so in equity, if a suit be brought to foreclose a mortgage, and the bill be taken *as confessed*, a decree may be entered accordingly; but if the deed of mortgage, referred to by the bill, is not filed, no decree can be entered. Again, at law, an action on the case for money had and received is brought, and a judgment by *default*, and a *writ of*

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inquiry awarded, directing a Jury to ascertain the damages, upon the execution thereof, the plaintiff cannot recover more than what he can prove, and, if he is without proof, he shall not have a verdict for more than a *cent*. And so in equity, if a suit be brought for the settlement of accounts which could not be done at law, and the defendant makes *default*, yet the plaintiff shall not have a decree without proof; and for that purpose, the legislature hath provided, that "*the plaintiff may have a general commission to take depositions, or he may move the Court to bring the defendant in to answer interrogatories, at his election, and proceed on to a hearing;*" so that the fair construction of a judgment by *default* at law, or bill in equity, *taken as confessed*, is, that the plaintiff, in either Court, can recover no more than he can entitle himself to by *proof*, to be obtained according to the course of the Court, which imposes no hardship upon him, as in either Court, in case of an *issue*, he would have to prove his claim; and the judgment *by default* at law, or the bill, as *confessed* in equity, only fixes the period, beyond which the plaintiff shall not be *delayed* in obtaining his *proof*, and proceeding "*on to a hearing.*"

The motions for decrees, under such circumstances, were denied, and the bar requested to take notice that the practice, in this respect, was now settled.

Winston *against* Campbell.

February term, 1810.

Campbell *against* Winston.

An answer, filed by an *infant*, may be amended, *on motion*, when he attains his age.

ONE of the defendants, against whom there had been an interlocutory decree during his minority, was allowed, upon coming of full age, to amend his answer upon motion.

February term, 1810.

Cutting *et Ux. against* Carter.

THIS case was sent to the Chancellor in the last vacation, for an order for an account, while the cause stood at rules.

By the Chancellor. An order for an account is not to be made as *of course*, and should not be directed, but upon a *hearing*, unless the parties consent. The application was therefore premature; but where it would be proper, as for instance, in all cases where the cause is ready for a decision, which cannot be had without an account, it should not be directed in vacation, without notice to the adverse party or his counsel.

February term, 1810.

Bass *against* Bass.

1. A bill for *discovery* lies only in cases where the plaintiff's right cannot be established without the discovery sought for. It does not lie, therefore, to discover the *name* of a negro child, whose mother is known, nor the *profits of slaves*, of which a *Jury* are the best judges.

THE bill in this case was filed to recover some negroes, to the recovery of which at law, there was no other objection than the want of a *name* to a child, and the profits of *Doll* the mother; of all which the bill sought a *discovery*. The *jurisdiction* of the Court was objected to by the answer, and that was the only question argued and submitted.

2. An action of *detinue* may be maintained for an *infant negro child of such a mother*, without any other description.

By the Chancellor. That an action of *detinue* might be maintained at law, for *Doll and her infant child*, I have no doubt, as *this* would be as good a description of the *latter* as the name would be of the *former*; and, therefore, the judgment might be *specifically* executed: so that the want of a name to the child was no ground for coming into equity: and as to the profits, a jury are always the best judges of the annual worth of negroes: so that this affords no ground.

The rule is this, that wherever a party's right depends upon a discovery, a Court of Equity has *jurisdiction*: but wherever *a discovery* is sought for, without which it is apparent upon the bill itself that the plaintiff may proceed at law, it shall not entitle him to relief in equity, though there be no *demurrer*. But wherever a *discovery* is sought, which from the face of the bill gives to the Court of Equity *jurisdiction*, there it will be sustained, unless it be taken away by a *plea*. Now it is clear to my mind, that the *discovery* sought by the present bill, was for no other purpose than to *attempt to give jurisdiction* to this Court, and that *without* such discovery, the plaintiff's remedy was clear at law.

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Bill dismissed, *without prejudice*, with costs.

Verdier *against* Hume and Hume.

February term, 1810.

THERE was an injunction in this case, as to 35*l.* 17*s.* part of a judgment at law against the plaintiff, in favour of one of the defendants, which the bill alleged was won at gaming, and that the judgment was obtained upon the testimony of the other defendant, who, it was alleged, was a partner of the plaintiff at law, of which a discovery was sought. The answer denied the *partnership*, or that any money was won at gaming. The proof was clear that a part of the 35*l.* 17*s.* was for money won, and that the defendant, on whose testimony the verdict was found, proved the whole demand: and now a motion was made to dissolve the injunction.

A verdict obtained at law, on the testimony of a single witness, whose answer (when he is brought into equity on the ground of his being a partner) is clearly contradicted, should be set aside, and a new trial directed.

By the Chancellor. The verdict in this case stands upon the testimony of a witness who proved the demand, and who has denied in his answer, that any part thereof was for gaming, notwithstanding the proof to the contrary and his

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knowledge of the fact: a verdict therefore under such circumstances ought not to be relied upon, and a new trial was ordered.

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Minor *against* Jones.

A party on whom process to revive is served, is allowed one term from the return day of such process, to prepare for trial.

IN this case it was stated and admitted, the process to revive had been executed, but not returned; and the question was, whether the party, on whom the process had been served, should have one term to prepare himself for trial, from the return day, or from the time when the order of revival might be made.

By the Chancellor. From the return day.

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Vaughan *et Ux. against* Wilson's Executor.

1. A *bill* of revivor is unnecessary, where a mere revival of the suit is sought, a *scire facias* being sufficient.

2. Objections to a *scire facias* to revive a suit cannot be made *on motion*: it should be by *plea*, or *demurrer*, or if, *at the hearing*, the party do not entitle himself to revive, the suit may be dismissed.

UPON the death of the plaintiffs and the executor of the defendant, a *sci. fa.* was issued in the name of the administrator of the *wife*, as she *survived* her husband, against the administrator of the executor of the defendant; to which it was objected, *upon motion*, that the *sci. fa.* should be dismissed, for the want of a *bill*.

By the Chancellor. The *sci. fa.* is given by an act of the assembly, and a bill is not necessary, where nothing but the mere revival is sought. But the defendant may *plead or demur* to the *sci. fa.* as he might, before the act, to a bill of revivor; and so at the hearing, if the party do not entitle himself to revive, the suit may be dismissed.

But to take up the subject out of order, and to dismiss the *sci. fa. on motion*, for the want of a bill, would be premature, if not improper.

Motion denied.

Beal *against* Gibson.

February term, 1810.

THE injunction awarded in this case, in *December* last, was to stay proceedings at law, on the usual terms, until the answer came in, which was filed on the first day of this month; and now a motion was made to *dissolve* the injunction.

1. Where an injunction is awarded "*until the coming in of the answer*, it is of course, at an end when the answer comes in; so that it is unnecessary for the defendant to move to *dissolve*; but the plaintiff may move to *reinstate*.

By the Chancellor. The motion should have been to *reinstate* the injunction, or it was, of course, at an end, and the clerk might give a certificate thereof, as in the case of an actual *dissolution*; for it was not intended to avoid in any case, the effect of the act of the legislature, by changing the form of the practice: and a case like the present is to be *dismissed*, under the act, as if the injunction had actually been *dissolved*, unless cause be shewn against it, as in other cases.

2. In such case, if the injunction be not reinstated the bill is to be dismissed under the act of assembly, unless cause be shewn against it at the ensuing term after coming in of the answer.

Brown, Rives & Co. *against* Wilson.

February term, 1810.

THERE was an order in this case, at last *September* term, that the defendant should *come* into Court to answer *interrogatories*, upon oath, as he had not answered. To this term he sent his answer, to which there was an objection, as being insufficient, and a motion was now made, to bring him in by a messenger.

Pratice as to bringing in the defendant by a *messenger*, to answer interrogatories.

By the Chancellor. The answer may be received, with liberty to except to it, since the order of the last term was not *peremptory*; in which case, the answer could only have been received with the leave of the Court.

For the future, the order will be to *bring* the party in, and a *messenger* will be sent for that express purpose in the first instance.

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Chapman *against* Tuberville.

Practice in appointing guardians to defend infants.

IN this case one of the defendants, who is an infant, had a guardian appointed to defend him; and, for some reasons which the guardian assigned, the Court, at his instance discharged the order: and now Mr. *Botts* moved, that as it was the interest of the infant's friends to decline his defence, in order to keep the plaintiff out of his rights, the clerk of this Court should be appointed as the standing guardian of the infant suitors, or that the last order should be discharged, so as to leave the first in force; but this was objected to by Mr. *Williams*, upon the ground that the guardian had a conflicting interest with the infant, and so the suit had stood for about a year.

By the Chancellor. The usual practice in this Court has been, to appoint a friend to defend an infant, and I see no necessity for departing from it: and unless the guardian who was appointed, can find some other friend, who will act for the infant, the last order may be discharged; for it really does seem as if there was some collusion in this case, from the great length of time it has been in this situation. No other person was named, and the last order was discharged.

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Plainville *against* Brown *et al.*

A commission to examine one of the defendants as a witness, should be awarded on the motion of the plaintiff, as a matter of course, saving all just exceptions.

THE plaintiff moved for a commission in this case, to examine one of the defendants as a witness, saving all just exceptions.

By the Chancellor. Let the commission go as a matter of course.

Harrison *against* Morton.

February term, 1810.

Mr. LOCKETT, an attorney at law, by counsel, moved to be made a defendant in this case, as being interested in the judgment at law.

A *motion* to be admitted as a *defendant* is not regular. But in case of an *injunction*, if it appear that the person making the motion is interested in the subject of controversy, the Court will order the injunction to be *dissolved*, unless the plaintiff will amend his bill, and make him a defendant.

Mr. *Wickham*, the counsel for the defendant, opposed the motion upon the ground of irregularity.

By the Chancellor. It is true that this is not a regular motion, but as this is an *injunction*, if the counsel for Mr. *Lockett* can satisfy the Court of his interest in the judgment at law, the Court will order the injunction to stand *dissolved*, unless the plaintiff will amend his bill and make Mr. *Lockett* a party.

The proof was offered and the plaintiff moved to amend accordingly, which was allowed.

Turpin, Administrator of James, *against* Jefferson.

February term, 1810.

The bill in this case was filed for an injunction, which was awarded, and the cause now stood upon an order taking the bill *for confessed*, and a motion was made to discharge the injunction, upon the ground that it was improvidently granted.

After a bill of injunction has been taken for *confessed*, for want of an answer, a motion will not be received from the defendant to discharge it, as having been improvidently awarded.

By the Chancellor. I had very great doubts at first about granting the injunction, but as the defendant is in *contempt*, such a motion comes from him with rather a bad grace.

Motion denied.

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Lambert *against* Key.

A plaintiff not being an inhabitant of this Commonwealth may be ruled to give security for the costs *in this Court*; but not for costs incurred in the Court of Appeals from which the suit was remanded for further proceedings.

THERE had been a decree against the defendant from which he appealed, and the Court of Appeals reversed it, and the cause was sent back; and now Mr. *Hay* moved, as the plaintiff was not an inhabitant of this Commonwealth, that he should be ruled to security not only for the costs of the suit in this Court, but for the costs expended by *Key* in the Court of Appeals.

By the Chancellor. The act of assembly, which authorizes the former part of this motion, does not authorize the latter, and therefore it cannot be granted.

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Fisher *against* Fisher.

After a decree for an account against a defendant who is *in contempt*, and a report of the Commissioner, such defendant can be permitted to file his answer *on condition only*, that he does not delay the trial.

THERE was a decree, for an account, in this case, against one of the defendants, who was in *contempt*, and a report of the Commissioner, and the cause ready for trial; and now, that defendant moved for leave to file his answer.

By the Chancellor. If the answer had been filed in the regular course of the Court, six months would have been allowed by the act of assembly, to the defendant, after replication, to take his testimony, and to prepare for a trial; but, as the defendant is in *contempt*, he can only be allowed to file his answer, upon condition, that the trial shall not be delayed by a general replication, which may be filed in Court.

Greenhow *against* Coutts *et al.*

February term, 1810.

A marriage settlement on a wife with whom the husband had long lived in a state of *fornication*, and by whom he had several children, will be deemed not to have been on *valuable consideration*, but *voluntary* and *fraudulent* as to creditors.

On the 29th *August*, 1799, *Reuben Coutts* executed three notes, under seal, to *Hicks* and *Campbell*, for 154*l.* 3*s.* 4*d.* each, with interest, payable on the 1st day of *September*, 1800, 1801, and 1802, in which he bound his heirs. On the same day, these notes were assigned to *George Greenhow*, with an express liability, by the assignors, in case of *Coutts'* insolvency; and in *May*, 1802, and *March*, 1803, judgments were obtained, upon them, against *Coutts*; and in *July*, 1806, these judgments were transferred to Dr. *James Greenhow*. On the 29th *August*, 1799, *Coutts* made a mortgage for some *Kentucky* lands, to *George Greenhow*, to secure the payment of those notes; and it was agreed that he might sue *at law*, or *in equity*, but not in the latter, until after the 29th *September*, 1804. On the 10th *September*, 1799, *Coutts* made a marriage settlement upon a woman, with whom he had long lived in a state of *fornication*, and by whom he had several children, for, and in consideration of their intended marriage, which was celebrated about the 17th of the same month. By the settlement, *Coutts* conveyed the whole of his estate; 1st. For the use of himself, until the marriage; 2d. For the joint use of both, and for their children; 3d. If *he* survived *her*, for his support out of the rents and profits; 4th. If *she* survived *him*, for the payment to her, annually, of 150*l.* for her life, in lieu of her dower; and, 5th. On the death of both, to be divided, as directed by the articles, among the children of the marriage. After this *Coutts* made his will, and confirmed all the provisions of the marriage articles, and then devised a small real estate to his wife and her heirs, and all the rest of his estate he devised to his children, appointed executors, and died. Under these circumstances, the bill, in this case, was brought to set aside the marriage articles, as being *voluntary, and fraudulent* as to creditors, and to be let in

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for a satisfaction of the judgments at law, out of the real and personal estate of the said *Coutts*. To this it was objected, 1st. That the marriage articles were entered into for a valuable consideration; and 2d. That the mortgaged lands had been lost by the *negligence* of the mortgagee, by the non-payment of taxes; and, therefore, he should be accountable for the value of the lands. These points were argued, and submitted.

By the Chancellor. There can be no doubt but marriage, for the benefit of society, is a good consideration, where there is any personal inducement to it, but where there is not, it should not, of itself, be deemed a *good consideration against creditors;* and more especially in the present case, where the parties lived in open violation of the laws, and to the evil example of the whole community. Would it not be monstrous to say, that *Coutts*, who was really an old man, far beyond the prime of his life, after so many years spent with a woman in a state of *fornication*, should be allowed to avoid the payment of his debts, by entering into a marriage contract with her? What was the inducement to it but to avoid his creditors? Attend to the circumstances: on the 29th of *August*, 1799, the debts were contracted; on the 10th *September* following, a marriage settlement was entered into; and, on or about the 17th of the same month, the marriage was actually celebrated; the consideration of which, was the settlement of all his estate for the purpose above mentioned, and the children of the marriage, all of whom were born *before*, and not *afterwards*. The case is too palpable, and the cases relied on, do not apply. Every aspect of the record shows that *Coutts* had increased his estate, at least, to the amount of these judgments, with a clear intention not to pay them; and, although the agreement may be good as between the *parties*, yet, as to *creditors*, it is void.

As to the mortgage subject: it was the duty of *Coutts* to pay the taxes; so that it was *his*, and not *Greenhow's* neglect that the land was lost.

The decree may be:

1. That the marriage articles are to be considered void as to creditors.

2. That the executors settle their accounts of administration. And,

3. That the legatess render an account of the personal estate received by each.

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Johnston *against* Bower *et al.*

February term, 1810. See *ante*, p. 476.

A plea to the jurisdiction of this Court that a suit is depending in an inferior Court for the same matter, is proper.

THE rule made in this cause at the last term, was now, on the motion of Mr. *Botts*, discharged, and *The Chancellor* said, that a *plea* to the jurisdiction of this Court, of the suit depending in the Court below, was proper; and, thereupon the plea was filed, and referred to a Commissioner of the Court to report upon the facts.

Owen *against* Cogbill *et al.*

February term, 1810.

Construction of the act of descents, as to the mother's inheriting the estate from an infant child, on whom it descended from the *great uncle* of the infant.

JOHN COGBILL died intestate, seised of lands in fee-simple. Before his death, one of his nephews, *Thomas W. Cogbill*, died intestate, and left *Sally Wilson Cogbill*, his only child, an infant of very tender years, who survived the first intestate, and died, leaving her mother and an aunt, the only sister of her father; there being no grandfather or grandmother on the father's side of the infant, nor uncles nor their descendants; and the only question was, between the *aunt* and the *mother* of the infant, whether the former should take the *whole*, *or a moiety*.

By the Chancellor. The act of Assembly of 1785 totally abolished the common law, as to the course of descents, and established a new system. By this act there was not, per-

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haps, a single case unprovided for. The fifth and sixth sections of the act of 1792, were taken from the act of 1780, and form the only *exceptions* to the general rules prescribed by the act of 1785; and which show the correct construction of these acts to be this, that that which does not come within the *exceptions*, must be governed by the general provisions of the act as they stood in the act of 1785; and, therefore, as the *infant* in this case did not derive her title from her *father*, but from her *great uncle*, it is not a case within the fifth section of the act of 1792, and must be decided according to the general provisions thereof, which gives to the mother of an infant that to which the infant was entitled, which in this case was one moiety of the share allotted to the aunt.

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Ross *against* Carter.

A commission cannot issue at the instance of a defendant to examine the *plaintiff* as a witness in the cause.

BOTT'S moved, on behalf of the defendant, for a commission to examine *the plaintiff de bene esse* saving all just exceptions.

By the Chancellor. The plaintiff has either an interest in the subject of the suit, or he has not; if he has, he should not give evidence; if he has not, the suit should not be brought in his name, which, in any event makes him personally liable for *costs* in case the suit goes against him.

Motion denied.

Pleasants *against* Logan.

February term, 1810.

IN this case there had been a decree in part, and a long time had elapsed since the cause had been set for hearing upon a *publication* of depositions; and now a motion was made by Mr. *Copland* to amend the bill by charging a new and material fact, to wit, *fraud;* to this there was an objection by Mr. *Hay*, which was submitted to the Court.

After publication of depositions, and the cause set down for hearing, the original bill cannot be *amended* by making new parties, or charging a new fact; but a *supplemental bill* may be offered.

By the Chancellor. The rule of the Court is, that after a *publication*, and the cause regularly set down, you cannot *amend* by making parties, and cannot introduce new charges, or put a material fact in issue which was not in the case before; but you may prefer a supplemental bill.

Motion denied.

Chew *against* Hoe.

February term, 1810.

IN this case, on the death of the plaintiff, a *sci. fa.* had been issued in the name of his executors, which was returned executed, to this term; and now, Mr. *Stanard*, as their counsel, moved to try the cause.

The rule which gives executors or administrators a term after process of revival returned, is *for their benefit; they* may therefore, *waive it*, and try the cause.

By the Chancellor. The rule of Court, which gives to executors or administrators a term after process of revival returned executed, was for their benefit; but they may *waive it* if they please, and try the cause; and so it was ruled accordingly.

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M'Rae *against* Bates.

In a suit in equity against executors, it is not regular to enter a decree to be levied of the goods of the testator, without an *account*.

IN this case Mr. *Dade* proposed to take a decree, *without an account*, to be levied of the goods and chattels of the testator. *The Chancellor* objected to it upon this ground, that if the decree was not *satisfied*, the plaintiff would have to go to law to fix a *devastavit*, or to come again into this Court for an account, which if directed now, the decree may be a *personal* one, in the event of assets; and if necessary, the bill can be so amended as to extend to the *remotest* responsibility. Mr. *Dade* then withdrew his proposition, and took an order for an *account*.

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Skipwith *against* Gibson and Jefferson.

It is not *usury* to sell bank stock at a very high price; since, to constitute usury, there must be a treaty for the *loan* or *forbearance* of money.

IN this case an injunction had been applied for upon the ground of *usury*, and *refused*, because, from the bill and the evidence, it appeared to have been a fair sale of bank stock, *uniconnected with either a treaty for the loan or forbearance of money*. The bill was, notwithstanding, filed, and the cause regularly brought to a hearing, and was argued by counsel and submitted.

By the Chancellor. To constitute *usury*, both parties must be consenting to the corrupt agreement; and it must proceed from, and be connected with, a treaty for the *loan* or *forbearance of money*, (*Bristoe* v. *Gibson*, 1 *Call*. *Price* v. *Campbell*, 2 *Call*,) nothing of which appears in this case; but it was urged, that the price at which the stock sold was sufficient evidence of *usury*; but certainly not, as *bank stock*, like *tobacco* or *flour*, or any other property, may be, from a variety of causes, worth more or less, and a fair *bona fide* sale cannot be impeached on account of the price. To all this

cases produced, one sufficient answer may be given, that, in every instance a *loan* of money was proposed, and, most clearly to avoid the statute, bank stock was advanced, or goods sold at a price above the current value, and hence it was held to be *usurious*, and all this was correct; and although *Skipwith* wanted to raise money for a particular object, yet to borrow it, was not even hinted at by him, nor does it appear to have been thought of by the defendants or their broker. The proposition was made for the purchase of stock, *unconnected* with any thing like a *loan*; and, as to *forbearance*, it is out of the question, for at the time of this transaction there was not any debt between these parties.

Bill dismissed with costs.

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Nicolson & Heth *against* Hancock *et al.*

February term, 1809.

THE bill in this case was offered during the last spring vacation for an injunction. It was stated in the bill that the plaintiffs, on the 25th of *December*, 1803, leased of *David Ross* and *James Currie*, a tract of land in the County of *Henrico*, call the *Deep Run Coal Pits*, for seven years; that *Ross* was two thirds owner of the land, and *Currie* one third; that the rent was payable on the first day of *January* in each year; that *Ross's* proportion was 666 dollars and 66 cents; that in *April*, 1806, the plaintiffs not being indebted to *Ross* one shilling, he proposed to them that they should accept his drafts, commonly called accommodation drafts, which he should either discount at bank, or with private individuals, and that he would always take them up when they fell due, which they did for his accommodation, until they determined to renew no longer; that in consequence of this determination, they had to take up at the bank two drafts, one dated the 15th *June*, 1807, for 830 dollars, at six months; the other dated the 10th *December*, 1807, for 1,200 dollars,

1. Unless the plaintiff can shew, from some peculiar circumstances not within his control, that he could not be relieved at law, he shall not be permitted to come into a Court of Equity.

2. The plaintiff in *replevin* may avail himself of a set-off, on the same principle that a defendant may prove discounts in any other suit.

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at ninety days; and both acknowledged by him to be accommodation drafts, accepted and paid by them; and in which they had no interest. That on the 1st *January*, 1808, he was indebted to them in the sum of 159 dollars and 51 cents; and on the 1st of *January*, 1809, after giving him credit for his part of the rent and coal yard in *Chesterfield*, the balance against him in their favour, was 1,080 dollars and 23 cents, besides interest. That the defendants, some time in the year 1808, bought of the said *Ross* his interest in the said coal lands; and in *January* last, caused *distress* to be made in their names on the plaintiffs' property, for the rent due in the name of the said *Ross* for the preceding year; and they were compelled to execute a replevy bond with security for the same, payable in three months: that this distress was made at a time, when they *believe* the said *Hancock* knew that the said *Ross* was indebted to them in a greater sum than the rent. That probably the said *Hancock* supposed himself entitled to the rent, because the said *Nicolson*, one day in a jocose way, said to him, "he hoped he would be indulgent as to the rent;" that the defendants stand on no better ground than *Ross*, to whom the plaintiffs would not be compelled to pay the rent of 1808, under the circumstances aforesaid; and therefore they prayed for an injunction and for general relief.

By the Chancellor. This is understood to be an application for an injunction upon the ground, that *no rent* was due at the time of the *distress*. If this was the *fact*, it was a proper case for relief at law; but the plaintiffs, instead of availing themselves of relief there, have come here for it, after availing themselves of the delay of the law by giving a replevin bond; but this Court cannot interpose under such circumstances; and let it be recollected, that where a party has relief at law, he must avail himself of it, by making a proper defence; if he does not, he closes the door of equity against himself, unless he can shew, from some peculiar

circumstances, which must be *true*, and not within his *control*, that he could not avail himself at law; for otherwise every case may be liable to be brought into this Court.

Motion *denied*;

And afterwards, in the *June* term, renewed, upon a supplemental bill stating, that the plaintiffs were governed in their conduct by their counsel, and of which he gave a certificate, "that a Court of Chancery would afford relief notwithstanding the replevy bond."

By the Chancellor. The rule as laid down in this case, when this motion was first made, has been reconsidered and approved; and now let me again test this application, by that rule, namely, "*that unless the plaintiffs can shew from some peculiar circumstances which must be true, and not within their control, that they could not be relieved at law, they shall not be allowed to come into this Court; for otherwise, every case may be liable to be brought in;*" as for example: suppose one who never had the small-pox was sued at law in one of the common law Courts of this place, and on his way hither to make his defence, he should hear that that complaint was in town; and from a fear of taking it he should return, and a judgment was to go against him, this Court should, under such circumstances, upon the usual proof, grant an injunction; but if upon the coming in of the answer, the facts were denied and not proved, the injunction should be *dissolved*; and so in a case where an injunction should be obtained, and upon filing the answer, it should appear, that the circumstances under which it was obtained, might have been controlled, it should likewise be *dissolved*, and the party left to the consequences of the law; because in either case, his application was made with *unclean* hands, against one of the plainest principles of the Court, namely, that relief shall never be afforded but to those who come without *blame* in themselves; but where the circumstances under which relief could not be

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obtained at law, are true, and cannot be controlled, there relief in equity should be afforded; but in this case, though the circumstances stated in the supplemental bill be true, it was within the control of the plaintiffs, for they might have had better advice from their counsel, if he had given himself the trouble to examine the subject upon principle; for I hold it to be a very clear case, that the errors of a *competent tribunal* at law, which can or might have been corrected there, affords no ground for relief in equity; but they must be corrected by a Superior Court in the mode pointed out by law. 1 *Call*, 546. *Terrell* v. *Dick*; 2 *Hen. & Munf.* 139. *Turpin* v. *Thomas*, are authorities completely up to this point; much less then, can the *errors* of counsel furnish ground for relief in equity; for surely the party who takes advice must abide the consequences of it. This may be thought a strict rule, but it is a just one, and it will be found in practice as beneficial as economical, since it will make parties attend in the *first* instance, to their rights at law, where the witnesses generally must be in person, and can be *seen* at the same time that they are *cross-examined* and heard, which is one of the best means by which the truth can be attained; but in this Court the mode of proof is different; the testimony is upon paper; a mode much more liable to abuse than the former, and therefore it should not be resorted to but where relief cannot be obtained by means of the law: by a strict adherence to this course, the ancient trial by jury, which is preferable to all others, will be preserved; and the saving to suitors on account of costs, will be immense; for it is a fact, that I have dissolved at least one hundred injunctions which had been granted by my predecessor, without having been asked, in a single instance, (as well as I recollect,) upon what ground: and it is equally true, that notwithstanding the strictness which I have observed, in granting injunctions, that not *one* in *ten* stands the test upon a motion to dissolve: for these reasons I must adhere to the most rigid rules of the Court; and with me there remains not a doubt but that the whole country will find their interests supported by it.

But upon the merits, the plaintiffs should not be relieved; and why? because the equity now set up, existed before they gave their bond for the rent, payable to the defendants in three months. The plaintiffs then, and not the defendants, *Hancock and Gilliat*, should be turned over to *Ross*, as they may have discharged him, relying upon the plaintiffs, in consequence of their conduct, in *first* asking indulgence, and then giving their bond for the rent.

I do not mean to say any thing to affect the general rule, that an *assignee* cannot be in a better situation than the *assignor*, as to the *obligor's* equity; unless by the act of the *obligor* himself, as in the case of *Hoomes, Executor of Elliot*, v. *Smock*, 1 *Wash.* 389. and so in the case before me, *Ross* could not place the defendants, *Hancock and Gilliat*, in a better situation than he himself occupied, but the plaintiffs might, and so they did, by giving their bond to those defendants. To illustrate this by example, let it be stated, that A. transfers his claim on B. to C. and upon application B. executes his bond to C. who thereupon discharges A. and afterwards C. obtains a judgment against B. upon this bond, who applies for relief to a Court of Chancery upon some ground of *latent* equity between him and A.; B. should certainly be turned over to A., and not allowed relief against C. This is a like case with the one before the Court.

Motion again denied.

Mr. *Hay* then said, that he had been employed in this case, and should have been glad to have made some remarks before the Court had decided, if he had been apprized of the Court's intention.

The Chancellor said he might be heard on the first motion day; and the counsel who made the motion said, he would, with the leave of the Court, avail himself of the indulgence granted to Mr. *Hay* to put into the Chancellor's hands some notes, which the Court said he might do.

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Mr. *Hay* was fully heard, and the other counsel filed his notes.

Curia advisare vult.

By the Chancellor. Mr. *Hay*, in taking a general view of this case, said, "that it was not universally true, that where relief could be had at law, it should not be had in equity; as for example, in waste, in dower, and in the case of a nuisance, relief may be had in chancery, though it may also be had at law; that a matter of discount was not a matter of *original* jurisdiction at law; and that it never had been decided that one who had a discount, should not have it in equity, unless he had failed at law; but he admitted, that if the rent had been actually paid to *Ross*, the plaintiffs might have been relieved at law, in a writ of replevin, but that they could not in the present case, as the payment was on account of other matters, for the statute concerning discounts did not embrace the case of a tenant or plaintiff in replevin, and that a Court of Equity should not be so strict in confining a party to relief at law, in a writ of replevin, as in other actions, because, if he should be cast, he would have to pay double the amount of the rent in arrear;" and according to the fashion of the times, Mr. *Hay* referred the Court to several *English authorities*, and to a few home decisions. But as his whole argument went to prove that the plaintiffs could not have been relieved by a writ of replevin, as evidence of the discount, in that kind of action, would have been improper, I shall confine myself to the examination of this point principally.

The whole case then, is reduced to this question; could the plaintiffs, in a writ of replevin, have given evidence of the advancement of money to *Ross*, while they were his tenants, which overpaid the *rent* that was due to him, before he sold the *leaschold* premises to the defendants? If the plaintiffs could have given such evidence at law, they cannot, upon Mr. *Hay's* own principles, be admitted now to come into equity, unless they bring themselves within the rule as

laid down. To illustrate this point by example: I will suppose, that the defendants *Hancock and Gilliat* had, instead of the distress which they made for the rent, brought an action of debt, as the assignees of *Ross*, might the plaintiffs not in this action have proved their discounts against him, before notice of the assignment, and must they not have been allowed agreeably to the statute in the edition of the laws by *Pleas. and Pace*, p. 36. s. 4.? The answer, I apprehend, is too clear in the affirmative to be questioned. I ask then if their rights can be changed, because of a different form of action? and the answer is, to my mind, equally clear that they cannot: for I take the law to be, that the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence. *Ib.* p. 80. s. 40. I have referred to this statute to prove, that the plaintiff in *replevin*, may do what a defendant in *all other* actions may: in other words, that their rights are the same, without regard to the *form* of the action: and by another statute, in what is called the old body of laws, p. 249. and in the 2d vol. by *Pleas.* 119. s. 1. the *defendant*, upon the trial of any suit, shall be at liberty to make all the discounts he can, and upon proof thereof, the same shall be allowed in court. But it was said, that this statute did not embrace the case of a tenant or plaintiff in replevin; but surely the equity of the statute does: but if it does not, may the defendants *Hancock* and *Gilliat*, not be considered as the grantors of the rent that was due to *Ross*, by the plaintiffs, at the time of the purchase of the defendants, *Hancock* and *Gilliat*, from *Ross* of the leasehold premises? and if so, by another statute, *Plea. and Pace's edition*, p. 156. s. 17. no tenant who, before notice of the grant, shall have paid the rent to the grantor, shall suffer any damage thereby: if this statute be applicable to the present case, as I apprehend it is, it would seem to be very clear, that if the plaintiffs had made advancements to *Ross*, before he sold the *leasehold* premises, and granted the rents thereof to the defendants

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Hancock and *Gilliat*, that the plaintiffs should not suffer any damage thereby, whether those advancements were made on account of the rent, or any other account; as *Ross* could not place *Hancock* and *Gilliat* in a better situation than he himself stood: for I hold it to be very clear, that in a writ of replevin between *Ross* and the plaintiffs, evidence might have been given of the discounts; and of course that they might have been proved in a writ of replevin, between the plaintiffs and *Hancock* and *Gilliat*, as *Ross's* grantors, or assignees.

This is a short view of the case before me, as presented under our own statutes, and I think that they very clearly warrant the construction which I have given to them; but it was said by Mr. *Hay* in his argument, that as in *England*, it had been held, that the statutes of set-off did not extend to a replevin, the same rules should obtain here: but I think otherwise; because I disapprove of the reason given for it there, namely, that a *replevin* is not an *action*, but a remedy without suit, and like an action for a tort. *Bull. N. P.* 181. and *Montag. on Set-Off*, 18. And Mr. *Kenyon*, the Chief Justice said, that it was much to be lamented, that it had been so decided; but that such was the law; and in this, were I a Judge in his country, I might concur with him; but as I am not, I shall lay down a different rule here: and again, our statutes of set-off are not like those in *England*; for there the statutes of set-off speak of *mutual* debts, which was the common law principle: but here, a defendant in *any* suit is allowed to make *all* the discounts he can, and upon proof thereof shall be allowed them in Court; by which, most clearly, the legislature meant to extend the common law rule; and I have before said, that a *plaintiff* in replevin has the same rights, as a *defendant* in all other actions has: and in support of which I must beg leave to draw to my aid the case of *Turberville* v. *Self*, 2 *Wash.* 71. where the Court of Appeals must have given the same construction to our statutes, or in that case the Court could not have affirmed the judgment of the District Court of *Westmoreland*, which had allowed *Self*, the plaintiff in replevin, to give in evidence an award of the arbitrators made

after the distress, but respecting accounts which subsisted between the parties *before*, to shew that he did not owe any part of the rent to *Turberville:* upon the whole, I have no doubt, but that under our statutes, discounts in *replevin* may be proved, in order to shew that the avowant distrained for too much rent; and therefore it devolves upon the plaintiffs to bring themselves within the rule as laid down, or to stand bound by their own act: for certainly there is no principle better settled than this, that *discounts* should not be *first* set up in *equity* without some sufficient reason.

As to relief in equity, in *waste*, in *dower*, and in the case of a *nuisance*, though it may also be had at law, this is true as a general proposition; but it is not true, even in those cases, where there is no *impediment* at law; for wherever that is the case, this Court should not interfere. As to the severity of the law, I have nothing to say, except, that I cannot lend my aid to assist a party to avoid the consequences of a statute, unless he brings himself within the rule as before laid down: if the statute is *hard* and *unjust*, the Legislature should change it; but this Court should not.

The notes of the other counsel are next in order; and so far as he has taken a different view of the subject from Mr. *Hay*, they will be stated and considered.

He said, "that if A. was sued on a bond, and *negligently* suffered a judgment to go against him *by default*, when he might have defended himself, and proved payment of the debt; yet that this Court would relieve him; that his clients were blameless, and that if he was in an error, he was partly brought into it by the Court of Appeals, in the case of *White, Whittle & Co.* v. *Bannister's Executors*, 1 *Wash.* 156. where it never was doubted but that a Court of Equity would give relief, *notwithstanding* the party complaining might have resorted to a writ of *replevin;* that he had practised law for twenty-three years and upwards, and in all that time he had never known but one writ of *replevin* prosecuted; and that at least twenty cases like the present had been entertained in the Courts of Equity; that the writ of

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replevin was nearly as *obsolete* as the *audita querela*; that as Courts of Law would allow of suits for money paid by *mistake*, a Court of Equity, if one had given his bond for money under like circumstances, would relieve against a judgment thereupon:" and he closed his remarks, by complaining of the animadversions of the Court upon the conduct of his clients.

As to A.'s case, I repeat again, that this Court could not relieve in such a case without violating every legitimate principle of the Court, unless the application was made within the rule as laid down.

The misapprehension as to the case of *White, Whittle & Co.* v. *Bannister's Executors*, proves how dangerous it would be to the common law jurisdiction of this country, to open the door of this Court to protect our citizens against the *mistakes* of counsel, and, more especially, when we consider what a number of inexperienced young gentlemen are daily turning out in the profession of the law. I have very attentively examined this case for the principle said to have been decided in it, and I cannot find even the word *replevin* in any part of it, which shews that the question, as to *jurisdiction*, was not made; and certainly there is no principle better known than this, that a question not made in the decision of a case is never considered as settled by it. But the case itself is totally unlike the present; for the appellees in that case were executors, and had distrained for rent upon a lease made by themselves upon the authority of their testator's will, and the discount offered was a debt due by their *testator*, and if it had been allowed, it might have subjected them to a *devastavit*; and, therefore, upon every principle, the appellants could not be relieved but in a Court of Equity, as their relief depended upon the amount of the assets, an amount of which was directed, although the injunction was dissolved.

Although the counsel has practised law for twenty-three years and upwards, and has not in all that time known but one writ of replevin to be prosecuted; yet, this only proves, that from his great attention to his profession in other re-

spects, he has not taken time to read with attention the reports of our own Courts; and therefore I will, with his permission, refer him to another case in 2 *Wash.* 71. and two others in 1 *Call*, 117. and 405. which have come to the Court of Appeals; and how many others, that have not been brought up to that Court, I cannot say. It is true, that such an action is not very common, but this is no objection to the legality of it; for it is expressly authorized by the Legislature, and forms a part of one of our most prominent statutes, in the edition of the laws by *Plea. and Pace*, p. 153. and should be resorted to upon all proper occasions; first, because it is the law; and, secondly, because the *trial* must be by a *jury*.

As to the number of cases like the present, which may have been entertained in equity, it may be well accounted for by all those who will give themselves the trouble to examine the course of our judicial proceedings from the time of the decision of the case of *Barret* v. *Floyd*, in the year 1790, until the decision of the case of *Terrel* v. *Dish* in 1799; but this case, and another which followed of *Turpin* v. *Thomas*, in 1808, most clearly overruled the case of *Barret* v. *Floyd*, as well as all those determined, in the mean time, upon like principles; and again settled the line of demarcation between the Courts of Law and Equity, upon very correct principles; and I pledge myself to be among the last to refuse my aid to support it.

Surely the counsel was not serious when he remarked that the writ of *replevin* was as nearly *obsolete* as the *audita querela;* for the former is not only prescribed as a *legal* remedy by a very recent act of the *legislature*, and is frequently put in practice; but the latter, even in *England*, has long since given way to a summary mode of relief upon motion, and there, as Judge *Blackstone* says, is quite driven out of practice; and I think I may venture to say, that it never was introduced into this country.

It is certainly true that a Court of Law will entertain a suit for money paid by mistake; and that a Court of Equity

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will relieve against judgment obtained upon a bond, given for money, under like circumstances, and for this plain reason, that at law you cannot go into the consideration of the bond, and therefore it is a good ground for relief in equity; but this is not the plaintiffs' case, for they knew what they were about.

Upon this view of the subject, these general rules present themselves as proper for the government of a Court of Equity.

1. That in all cases where a *remedy* may be had at law, *relief* shall not be had in equity, unless there be some *impediment* at law; and,

2. That in all cases where *relief* can be had *at law*, it shall not be had in *equity*, unless the case falls within the rule as before laid down; and which has been the standing course of the Court ever since I have had the honour of a seat on the bench.

And I entreat the gentlemen of the bar to take notice, that these general rules, as now again repeated, cannot be departed from, but must be steadily regarded by the court.

Motion finally denied.

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Ross *against* Austin.

1. The time allowed by a decree against an absent defendant, within which he might shew cause against it, having expired, the plaintiff is entitled to the benefit of the decree without giving the security originally required by it.

IN this case there was a decree for the plaintiff in June, 1802, against *Austin*, as an absent debtor; and the home defendants were decreed to pay to the plaintiff, on their account, 50*l*. with interest from the 1st *March*, 1798, and costs; upon condition that the plaintiff gave bond and security to restore to the absentee the sum aforesaid with the interest, in case he should claim the same and be adjudged

2. A home defendant, decreed to pay money to a creditor of an absent defendant will be compelled to pay interest, unless he make a legal tender, or bring the money into Court.

entitled thereto: the absentee died: and the security, by the plaintiff, was not given; and the time, within which the absentee or his representatives might make their appearance, having expired, the question was whether, to entitle the plaintiff now to the benefit of his decree, it was necessary to give the security: and, if it was not, whether the plaintiff was entitled to interest.

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By the Chancellor. It is too late now to open the decree, and therefore it is not necessary for the plaintiff to give the security thereby required.

As to interest: the home defendants might by a *legal* tender have exempted themselves from it, or they might have brought the money into Court; but, as they have done neither, but hold the use of the money, they must pay the interest upon it.

Mortimer *against* Moffatt and Wife.

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THE defendants had recovered a judgment at law against the plaintiff for some negroes, the use of whom was devised to the defendant's wife for life, and then to the plaintiff; and the bill was filed for an injunction, which was granted, to inhibit the defendants from getting possession of the negroes, until they gave security for their forthcoming at the death of the wife, upon this ground, that her husband, having failed as a merchant, might put the negroes beyond the plaintiff's control. Upon the coming in of the answer, although it denied that allegation, and of which there was no proof, the court refused to dissolve the injunction; as both parties had become interested in the continuance thereof; and directed an account of the profits since the verdict, which account was reported; and the cause now came on for a final hearing.

Though it is a matter of course for a remainder-man of personal chattels to file a bill against tenant for life, for an *account* and inventory of the property, yet the Court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear some danger of its being wasted, or put out of the way.

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By the Chancellor. Though it is a matter of course for one in remainder of chattels, to file a bill for an account, and an inventory of the property, that it may be certainly known; yet the court will not rule the tenant for life to give security, unless there appears *to be some danger* of wasting or putting the property out of the way. In this case that danger does not appear: the report, however, which contains an account of the property, may be confirmed, as a beneficial one to both sides, since the plaintiff was properly admitted into Court; and the plaintiff may be decreed to pay the sum reported against him; but the defendants will be allowed to hold the negroes and their increase, until the death of the wife, when they are to be delivered to the plaintiff: and so it was decreed accordingly.

Lane *against* Ellzey.

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1. While a defendant is in *contempt*, no *plea*, or *demurrer*, can be admitted, but upon *motion* in open Court.

2. A defendant's being in contempt to the *first process* of the Court, is not a contempt to the *decree*, and forms no objection to his pleading to a *scire facias* brought to revive that decree.

3. A defendant may plead to a *scire facias* brought to revive a decree, which was obtained against him *by default*, that the original contract was usurious.

THERE was a decree *by default*, in this case, to foreclose a mortgage: to this decree there was *a bill of review* filed by *Ellzey*, upon the ground of *usury*, and claiming to be released from the *interest*, which was decreed accordingly; and from which *Ellzey* appealed: the Court of Appeals reversed this decree, because the bill of review was improperly admitted by the late Chancellor, to an *interlocutory* decree.

The case then came back to this Court, and *Lane* being dead, a *sci. fa.* was sued forth to revive, in the name of his executors, which being returned executed, the defendant offered to show, by *plea*, that the revival, thereby sought, ought not to be had, because of the *usury* in the original contract: to this plea the plaintiffs objected.

1. Because the defendant being in *contempt*, should not be allowed to plead; and,

2. Because the plea goes to matter anterior to the decree. These points were argued and submitted.

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By the Chancellor. If the defendant was in *contempt* to the *decree* of the Court, he would not be allowed to make any application, but upon such conditions as should be just: *but he is not.* It is true, the decree was obtained *by default;* but this was the consequence of his *contempt* to the *first process* of the Court; and should not be considered as a *contempt* to the *decree*, which was obtained in a shorter time on that account; whereby the plaintiff was really benefited. The rule of practice is, that after being in *contempt*, no *plea* or *demurrer* shall be admitted, but upon motion in open Court: and, for the reason before given, that the Court may judge whether it be really a plea to the justice of the case or not, it was very proper, that the attorney-general should file his plea in Court; and, if it be such a one as the Court should have received before the decree, and when the defendant was in *contempt* to the original process, it should be received now: because it goes to shew that the plaintiff is not entitled to the aid of the Court, under any circumstances, if the contract be *usurious:* and now, as to the terms; the defendant must pay the costs of the bill of review, as well in this Court as in the Court of Appeals: and so the plea was admitted.

Lindsay *against* Campbell & Wheeler *et al.*

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A defendant, after an order for an *account*, may move to set it aside and file his answer, on paying the costs which may have accrued before the Commissioner.

IN this case the defendant had not answered, and an order had been entered for an account: and now Mr. *Thomas Marshall* moved for leave to set that order aside, and to file the defendants' answer.

By the Chancellor. This may be done, upon the payment of any costs which may have accrued before the Com-

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missioner: and *The Chancellor* said, that such would be the course of the Court.

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Storrs *against* Payne *et. al.*

A sheriff may file a bill of *interpleader*, to settle the rights of property, taken in execution, to which there are conflicting claims, but an injunction will not be awarded to stay any suit against him, in case of his selling the property; because the law provides him an ample remedy.

THE plaintiff, as Sheriff of *Henrico* County, took the goods and chattels of *J. S. Moore*, under an execution from this Court, on behalf of one *Taylor*. *Payne* one of the defendants claimed the goods: and the Sheriff exhibited his bill for an injunction to stay any suit that might be brought against him, and to compel *Payne* and *Taylor* to interplead as to their rights.

By the Chancellor. So far as this bill purports to be a bill of interpleader, the plaintiff may file it, if he pleases; but I cannot grant the injunction, as the act of assembly amply provides upon this subject for the Sheriff, who is not bound to act unless he is indemnified.

Motion for an injunction denied.

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Coleman's Case.

A wife, being a lunatic, and put under the care of a committee by the County Court, will be restored to her husband, by a decree of this Court, upon his giving bond and security according to law.

ORDERED, on the petition of *William Coleman*, whose wife, a *lunatic*, was put under the care of a committee, by the County Court of *Spotsylvania*, that she be restored to him, upon his entering into bond and security according to law for that purpose.

Ann Purcell *against* Charles Purcell.

THE bill in this case was filed to obtain *alimony*: it stated the marriage of the parties many years ago in *New-Jersey*, in the *United States*; and that, without any impropriety of behaviour on her part, he had separated himself from her, without affording to her any support; that with all her endeavours she had often been without the necessaries of life; and his knowledge of the fact, instead of exciting even compassion, had caused only contempt and insult; that she had been frequently compelled to depend upon *charity* for subsistence, while he enjoyed a very considerable estate real and personal: wherefore she prayed for an adequate support, and for general relief.

1. The Court of Chancery has jurisdiction in cases of *alimony*.

2. What evidence of marriage is deemed sufficient to entitle the wife to alimony.

3. How the performance of decrees for alimony is to be enforced, where the defendant stands out process of contempt.

In support of the allegations of the bill, there was the following proof:

1. *William Richardson* swore that in 1786 he was living in *Philadelphia*, a near neighbour to some of Mrs. *Purcell's* connexions, and occasionally visited them; that two of them, Mrs. *Duncan* and Mr. *Henry*, were both persons of wealth, and high respectability; that he often heard them express their sorrow at the marriage of their niece and cousin *Ann*, to *Charles Purcell*, from apprehensions that he would not make a good husband; that in 1787 or 1788, the deponent was in *Richmond*, and, among others, became a boarder at the house of *Charles Purcell*, and that he did believe the said *Ann* to be the lawful *spouse* of the said *Charles Purcell*.

2. *Minton Collins* swore, that he had been acquainted in the family of *Charles Purcell* about twenty years; that during the whole of his acquaintance, Mrs. *Purcell* was treated by the said *Charles Purcell* very affectionately, and that he did always believe she was his lawful wife, as she was introduced as such to the acquaintance of many genteel families in this city.

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3. Col. *Robert Gamble* swore, that in the year 1790, before he had removed to *Richmond*, but while he and Mrs. *Gamble* were on a visit to that place, Mrs. *Purcell* was introduced to Mrs. *Gamble*, by Mrs. *Sampson Matthews*, and several other ladies; that the deponent soon afterwards removed to *Richmond*, and from the spring of 1791 until the summer of 1798, he and his family were neighbours to *Charles Purcell*, during which time their families reciprocally interchanged the accustomed civilities; that the plaintiff and defendant lived apparently as man and wife; that he had seen Mrs. *Purcell* at the city assemblies or balls, and that reputable families were in the habit of visiting Mr. and Mrs. *Purcell* at their own house; that the deponent was called upon by the said *Charles*, to unite with Col. *Lambert*, to take his wife's privy examination, which they did; and that the said *Charles* always called the plaintiff Mrs. *Purcell.*

4. Col. *D. Lambert* swore, that at the request of Mr. *Charles Purcell*, he, with Col. *Gamble*, waited on the said *Ann*, at the house of the said *Charles*, on the eleventh of *February*, 1792, and took her relinquishment of dower in some real estate conveyed by them; and that he always understood and believed that the said *Ann* was the wife of the said *Charles Purcell*, until, lately, it has been otherwise hinted by the said *Charles Purcell.*

5. There was the certificate of the clerk of the *Husting's* Court of the city of *Richmond*, which stated, that the privy examination and relinquishment of dower, by the plaintiff, as stated by Col. *Gamble* and Col. *Lambert*, had been returned and duly recorded.

6. Besides, there were *seventeen* letters filed; three dated in 1794, 1798, and 1804, from their friends and connexions in *Ireland*, one directed to Mr. *Charles Purcell*, jeweller, *Richmond*, and the other two to Mrs. *Ann Purcell*, to the care of Mr. *Charles Purcell*, making the most friendly inquiries after them and their children; two others of a

most affectionate character, dated *June* and *July*, 1790, addressed by him to her, by the name of Mrs. *Ann Purcell*, while she was on a visit to her friends in *Philadelphia*; ten others of a like character, dated in 1799, 1800, 1801, 1802, and 1803, addressed by him to her by the same name, while she was in *New Kent*, at Mr. *Andrews'* in *Norfolk*, and in *Baltimore;* one other addressed to Mr. *Charles Purcell*, by Mr. *Pauley*, at whose house she had been accommodated, at the instance of the said *Purcell*, enclosing his bill, dated *July*, 1802; and one other from *Charles Purcell*, dated *Richmond*, *July*, 1804, in which he, for the first time, *denounced*(1) her; but advised her to go to her brother's, and as he might find it convenient, he would give her some assistance.

Upon the bill, and the evidence aforesaid, the plaintiff, by counsel, at *February* term, 1808, moved for *alimony pendente lite;* when the defendant, by counsel, asked leave to take the papers in order to file his answer, which was granted.

The answer was filed the next day; it positively denied the marriage; and stated, that in *April*, 1786, he had joined a boating party with the plaintiff and several others, and had taken a trip to the *Jerseys;* and that soon afterwards she voluntarily embarked with him for *Richmond*, where he acknowledged they had passed as man and wife; that the relinquishment of dower was taken more to satisfy those interested in the purchase-money, than for any other purpose; that he then denied the marriage; that in *August*, 1797, a young lady from *Ireland* was introduced to him, by the name of *Ann Church*, by *Robert Means*, as the niece of the plaintiff, whose expenses the defendant paid; but, in a short time, *Ann Church* proved to be an illegitimate daughter of the plaintiff; that, notwithstanding this, he educated her, and upon her marriage, gave her a house and lot in the city of *Richmond;* but then declared, that it was done for the respect which he once had for the said plaintiff; that in 1798, when his houses were consumed by fire, he was

(1) It was said at the bar, and not denied, that about this time he had formed a connexion with another woman.

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obliged to rent a house, to which he removed; but, the plaintiff thought proper to accept of the invitations of her friends, and not to go with him; that shortly after, she, of her own accord, without his knowledge, extended her visits to the borough of *Norfolk*, *Lynchburg*, *Williamsburg*, *Baltimore*, and other places, which he admitted she had a right to do; that in 1800, and 1804, she was in *Richmond*, and continued there for some time, without returning to him, or asserting any demand against him; but still he did afford her some aid; but declared it was from *charity*, and not from any *obligation* that he was under; that if she had been his wife, which he denied, yet her departure from him, and her manner of living afterwards, would be a bar to any claim of *dower*, if he were to die, and should be of course to *alimony*; and that if they were married, she could say where the marriage ceremony was performed, the clergyman, and the persons or some of them who were present; and in support of this answer, he filed the following proof:

1. The affidavit of *James Miller*, in which he stated that he had understood, from the plaintiff, that she and the defendant were married in *Philadelphia*.

2. The affidavit of *John Sedwick*, in which he stated, that about *December*, 1807, he understood from her that she was married in *Philadelphia* to *Charles Purcell*, but that she did not then wish to live with him as his wife; but merely to recover of him as much money as she could; and at another time she said they were married in the *Swedish* Church in *Philadelphia*, and that he, the deponent, replied, then you can get a certificate of your marriage; but she said, that they kept no record of marriages, and that after they were married, he left her at her aunt's door, and that he had no other knowledge of her until they embarked for *Richmond*.

3. The affidavit of *Robert Cowan*, in which he stated, that in 1803 and 1804, a person by the name of Mrs. *Purcell* was at *Norfolk*, and lived with *Jeremiah* [illegible], while his wife was in *England*; and that people spoke

freely of Mrs. *Purcell* on that account; and that as soon as Mrs. *Andrews* returned, Mrs. *Purcell* was discharged.

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4. The cross-examination of Col. *Gamble*, which had no bearing on the question.

And thereupon the plaintiff renewed her motion for *alimony pendente lite*. To which the counsel for the defendant objected:

1. Upon the ground of *jurisdiction*: and,
2. For the want of *sufficient* proof of the *marriage*.

By the Chancellor. If the jurisdiction of this court were now to be settled upon *English* precedents, there might be some doubt about the question, from the cases, as brought into one view, by Mr. *Fonblanque*; but I shall leave this clashing of *English* Judges to be reconciled among themselves, and take up the question upon first principles.

I hold, that in every well regulated government there must somewhere exist a power of affording a remedy where the law affords none; and this peculiarly belongs to a Court of Equity; and as husband and wife are considered as one person in law, it is evident, that in this case the law can afford no remedy; which is universally admitted to be a sufficient ground to give this Court jurisdiction; and therefore it must entertain the bill, if there be sufficient proof of the marriage.

The standing rule in equity is, that an answer is not evidence in favour of the defendant, unless it be responsive to the bill; and therefore, whatever the answer asserts *affirmatively*, in opposition to the plaintiff's demand, must be proved by indifferent testimony. Apply this rule then to the case before me, and the result will be, that the plaintiff must prove her marriage with the defendant, since he has denied it by his answer, and he must prove the other matters set out in his answer, as not being responsive to the bill; that is to say, he must prove, 1st. The circumstances which he states with respect to the relinquishment of her dower; 2d. That he then denied the marriage; 3d. That *Ann*

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Church was the natural daughter of the plaintiff; (if he, or his counsel, supposes that to make out these points would be of service;) 4th. That she refused to live with him in 1798, in the rented house; and, 5th. That her manner of living, while she was from him, was unlike an upright woman; or, if it is intended to charge her with living in *adultery*, it must be proved by him.

Thus, having stated what devolves on each party to prove, I will next examine the proof of the marriage, since it seems to be admitted on all hands, that if they were married, he must allow to her *alimony:* and I confess upon this point, I do not perceive any ground on which to rest a doubt: evidence of a like description, coming from him under like circumstances, of the most atrocious crime that he could commit, would be sufficient to take his life; and yet, we are told, it is not sufficient to fix one of the most honourable acts in society upon him; namely, that he was *married!* lest it should draw from him an annual support for his wife! and it was contended with great zeal and confidence, that there must be proof of an *actual* marriage, and that the defendant's *confession* of the fact, though attended with all the present circumstances, was not sufficient; and in support of this, one solitary case was produced, of *Miller* v. *Morris*, (4 *Burr.* 2057.) which was an action for criminal conversation with the plaintiff's wife, which certainly bears no analogy to this case, and, if it proves any thing, proves that evidence like that, which is now before the Court, may be admitted in all cases, but in prosecutions for *bigamy* and *crim. con.* for this plain reason, that a crime shall not be fixed upon one, but by the *highest evidence;* but the *virtuous* act of *matrimony* may in this case, as in many others, be proved by *cohabitation*, *name*, *reputation*, *and other circumstances.* The marriage then being fixed beyond any doubt, in my mind, it remains only to be inquired into, whether at this stage of the cause the defendant has fixed so much *blame* on his wife, as that she should not have *alimony pendente lite.* The rule as before laid down with

respect to the answer being evidence, must not be overlooked; and the defendant must prove his affirmative matter contained therein. But not one tittle of his proof supports the circumstances under which he states the dower to have been relinquished, or that he then denied the marriage, or that *Ann Church* was the natural daughter of his wife, or that she refused to live with him in 1798, or that she conducted herself improperly abroad: and the whole of the correspondence before stated proves that these things, so far as they were noticed in it, were not true; and this brings me to his evidence.

1. *James Miller's* affidavit states, that she said they were married in *Philadelphia;* but what does this prove? It may be a misapprehension on his part; and I am inclined to think it was.

2. As to the proof by *John Sedwich*, it is clear upon the face of his affidavits, that he was holding an unauthorized conversation with her, *if indeed he held one at all*, and that she was not bound to satisfy him about it; but if she did, is it not very likely, from the contiguity of *Philadelphia*, the *Delaware*, and the *Jerseys*, that names were mistaken or misapplied? and if so, then the evidence produced against her, as coming from herself, should not be garbled; and taken altogether, would fix the marriage. And,

3. If any one should be disposed to indulge his suspicions, because of the evidence of *Robert Cowan*, I would recommend it to such person to read the *letters* of the defendant, addressed to the plaintiff while she was in *Norfolk*, at the house of Mr. *Andrews*. Upon the whole, I do not discern any cause of complaint against the conduct of Mrs. *Purcell*, and she must be allowed *alimony pendente lite*.

Whereupon the Court then made an order to this effect, that the defendant should pay to the next friend of the plaintiff for her maintenance, quarterly, the sum of seventy-five dollars, pending this suit, to commence from the first of *January*, 1808, until the further order of the Court;

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unless the defendant should shew cause to the contrary, before the Judge in vacation, on the twentieth of *March* next.

The defendant then filed a cross bill against the plaintiff by the name of *Ann Hazleton*, and alleged therein that he never was married to her, and called on her to say, on oath, if they ever were married? and if they were, where did it take place? what was her name? who performed the ceremony? who were present when the ceremony was performed? where did they first become acquainted? were they married in a church, or in a private house? if the former, what church? if the latter, whose house? who were present, and where did they reside?

To this bill the plaintiff answered, that they *were* married, and that she is the wife of the said *Charles Purcell;* that their first acquaintance was at the house of a Mr. *Reynolds*, in *Philadelphia*, a seal-cutter and engraver, in the fall of 1785; that at the time of their intermarriage she bore the name of *Ann Hazleton;* that on the 10th *April*, 1786, they and Mr. and Mrs. *Emery*, and a Miss *Heizlar*, took a boat at *Walnut-street* wharf, and went over to the *New-Jersey* shore, where they were met by a man, whom the said *Charles* asserted, and she believed, was a clergyman of the *Swedish* congregation in *Philadelphia*, and then and there the ceremony was performed, in the presence of those persons: but where they reside now she cannot say; and then they returned to *Philadelphia;* and in a few days afterwards, on their way to the vessel which was to take them to *Richmond*, they met with Mr. *John Collins*, to whom she was introduced by the said *Charles* as his wife; and the said *Collins* then introduced her to the father of Mrs. *Collins* who is now Mrs. *H. Dabney*, of *Richmond;* that on their arrival in *Richmond*, they were very kindly received, and Mr. *Waddell* gave up his own room to them: and she referred to several respectable people, to prove the unvaried acknowledgments of the said *Charles* that she was his wife.

And now by consent of parties these causes came on to be heard together, and were submitted without further argument.

By the Chancellor. The only difference that I find between the record now, and when it was formerly before me, is in a cross bill and answer: surely if there was any room before to doubt about the marriage of these parties, the answer to the cross bill must now be considered as freeing the case of all such doubt; for the answer, being responsive to the bill, is good evidence in her favour: and monstrous indeed would be the state of that society which would admit a man, as, for example, *Charles Purcell*, to bring a woman from another country, and to introduce her here among his friends as his wife; live with her for many years as his wife; treat her as his wife; convey real estate, and have her relinquishment of dower taken as his wife; address to her letters, as his wife, and not compel him to maintain her as his wife, *unless she was in fault*; because *he says* he was not married to her. But this declaration cannot be believed: they both agree as to the trip to the *Jerseys*, and as to the time when it was made, but she gives the account of the marriage, in answer to one of his interrogatories, and therefore he must stand concluded upon that point: it may be that he practised a fraud upon her, and that the *Swedish* man was not a clergyman; yet it was done by the means of *Charles Purcell*, and not by *Ann Hazleton*; and I will, under all the circumstances of this case, hold him to it. The rule of law is, that in a controversy touching the validity of a marriage, as whether a marriage or not, no *alimony* is due until *some* matrimonial proof appear, or that it doth some way *constare de matrimonio*; but wherever a marriage doth appear, unless the wife be in fault, there *alimony* shall be due. *God. Rep. Can.* 510. and in a book entitled "*Praxis in foro Ecclesiastico*," tit. 35. p. 40. as translated by Mr. *Warden*, the rule in *England* was, when a suit was brought in the Ecclesiastical Court by a wife against her hus-

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band, the Judge first ascertained the marriage, which he did either by the answer of the proctor, or of the principal party, or by testimony; all of which has been done in this case.

The correspondence shews that the plaintiff left the defendant at his instance, and for his accommodation, after the fire in 1798; that in 1799 he boarded her at Mr. *Pauley's*, in *New Kent;* that in 1802, when she left Mr. *Pauley's*, she went to Mr. *Andrews'*, in *Norfolk*; that he the defendant afterwards wrote to her, stating that she must not return, and advised her, that if Mr. *Andrews* could not board her, to get him to provide her with board in a private house by the year, payable quarterly, and promised to send her some money in a short time: in 1803 he wrote to her again, and among other things stated, that he had sent Mr. *Andrews* three kegs of butter, and begged of her to be useful in his family, gave an account of his prospects, and assured her she should not want while he could command a shilling; in fact, it seems that she was kept off by his means, that he might recover from his embarrassments, and that when she conceived he had done so, and insisted upon her right to return, then for the first time he *denounced* her as the most unworthy of her sex. Upon this view of the case, and upon the ground of public convenience, as well as of that respect which is due to the matrimonial state, *Charles Purcell* should be considered as the husband of the plaintiff, and bound to afford to her a reasonable maintenance. The allowance *pendente lite* was made without any particular information with respect to the value of his property; and therefore the Court gave him a day to shew cause against it; if cause had been shewn, and the allowance had been too much, an injunction could have been granted to the excess; but as no cause was shewn, the allowance was deemed reasonable; and at an after day, when the parties were willing to bring on the cause, the Court thought it best, under all the circumstances of the case, to refer it to a Commissioner, to ascertain the value

of his property, that only a reasonable annual allowance might be made, that should be suitable to their station in life, for which purpose he was ordered to attend Commissioner *Ladd*; but although this was for his benefit, it was answered in his name, by a letter to the Commissioner, that the order was an unconstitutional attack on the liberty of a free citizen of *Virginia*, in terms and language very different from his letters addressed to Mrs. *Purcell*, which induces a belief that he was advised to this course, and was not in fact the author of the letter addressed to the Commissioner; and if that was the fact, and his adviser were known to the Court, if he should not have cause to regret it, the Court would not. The Commissioner however proceeded, and made a report upon the best information he could get, and reports the value of *Purcell's* property to be 29,800 dollars; but as it does not seem to be a very productive estate, and 75 dollars quarterly was thought sufficient, the Court will take that sum for its guide now, and fix the annual allowance at 300 dollars, with liberty, however, to each party to apply to the Court to increase it, or to diminish it, as circumstances may in future make it proper. This is as much as I think the Court can do. But the plaintiff's counsel supposed that the Court would set apart a third of the defendant's estate; but I suppose not: for the husband, though bound by every legal and moral principle to afford to his wife a support, yet if, in violation of these obligations, he becomes base enough to cast her off without any *just cause*, all, I apprehend, that can be imposed upon him is a suitable maintenance, which may be varied according to circumstances, and which should not continue longer than he is willing to restore her to the comforts of bed and board, and to give satisfactory assurances for her enjoyment thereof, which, if she should refuse, the allowance made for her support would, at his instance, be taken away; and if she were to survive him, she would be entitled to dower, and her *alimony* would of course

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cease. This is the opinion of the Court, conformably to which Mr. *Randolph* may draw a decree.

The decree was to this effect:

That the defendant in the first suit should annually, on the first day of *October*, pay to the plaintiff 300 dollars for her maintenance, until he shall restore her to the comforts of her bed and board, and give satisfactory assurances for her enjoyment thereof; that on the 1st *October* next the quarterly allowances are to cease; and liberty was reserved to each party, at any time, to apply to the Court to have an increase or diminution of the said annual allowance, as circumstances may in future make it proper; and the cross bill was dismissed; and it was ordered, that the costs of both suits be paid by the said *Charles Purcell;* who by counsel prayed an appeal, which the Court said he might have in the last suit, if he asked upon the usual terms; but in the first suit the appeal was refused for these reasons:

1. Because he had not made any of the quarterly payments, and was under a commission of *rebellion*.

2. Because the decree was not final, and the appeal was at the discretion of the Court; but the Chancellor said, that if *Charles Purcell* would come in and *free his contempt*, by paying up the arrears, and give security for the support of his wife pending the appeal, it should be granted; but his counsel said that he would not do it; and the Chancellor said, the appeal should not be allowed; and he added, that he had the highest authority in support of the principles which he had laid down, to wit, the universal sense of the country, as declared every day, with great propriety, in such cases in the County Courts, and in no instance had an appeal from their decisions ever been taken, which proved that where they acted, they had done right, and with which the people were perfectly satisfied.

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☞ After the decision of the above case by the Chancellor, the defendant's counsel made application to the Judges of the Court of Appeals, for leave to carry up the case to that Court, by appeal, which they *unanimously* refused, and expressed themselves perfectly satisfied with the decree upon the merits; so that the doctrine of *alimony* may now be considered as settled.

The *principle* having been settled, that the decree for alimony was rightly pronounced in this case, the following proceedings, to carry that decree into effect, have taken place in the Court of Chancery:

February 19*th*, 1810. The defendant was brought into Court, under a commission of *rebellion*, and refusing obedience to the former order of the Court, was ordered to be forthwith committed to the gaol of *Henrico* County.

February 27*th*, 1810. A writ of *habeas corpus*, on the motion of the defendant's counsel, was directed to the Sheriff of *Henrico* County, to bring the defendant up; because it was stated to the Court that he was now ready to do that which was required of him.

February 28*th*, 1810. The defendant was brought into Court, under the writ of *habeas corpus* awarded yesterday, and stated his willingness to do any thing which the Court should order, that he might be discharged:

And it was ordered that, upon executing a note for all the arrears due to the plaintiff, under the several orders of this Court, negotiable at the bank of *Virginia*, payable to the next friend of the plaintiff, with such endorsors as *Edmund Randolph*, Esq. the counsel of the plaintiff, should approve; and also entering into bond in the penalty of 4,200 dollars, with such security as he should also approve, conditioned to perform the decree of this Court, heretofore

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pronounced, that the *commission of rebellion should be superseded*, and the defendant discharged out of custody.

N. B. The security was given in the last instance, and the money paid in the first; and the defendant thereupon discharged.

END OF FEBRUARY TERM.

ADDITIONAL RULES OF THE COURT.

The following rules were entered among the standing orders of the Court, at *June* term, 1809. Rules of Court.

1. That the clerk of this Court shall not suffer the papers, in any case, to be taken from his office, at any time, by counsel, nor during term from the Court room, but by the Judge. 1. Clerk not to suffer papers to be taken from the office.

2. Reasonable *notice*, of all motions which are *not of course*, must be given to the adverse party. 2. *Notice* of motions which are not of course, required.

3. That every motion which is *not of course* must be supported by *affidavit*, and, 3. Motions not of course, to be supported by *affidavit*.

4. That each Commissioner of the Court must report to every term, the state of his docket, that the Court may know the delinquent party. 4. Commissioners to report state of their dockets to each term.

IN THE GENERAL COURT, JUNE TERM, 1808.

The Commonwealth *against* Alexander.

1. A justice of the peace may be *amerced* and *removed from office*, upon an *information* against him, in a Superior Court of criminal jurisdiction, for *misbehaviour in office*.

2. Being *intoxicated with spirituous liquors, while in the discharge of his official duties*, is a *sufficient misbehaviour*, for which a Justice of the Peace ought to be *amerced* and *removed from office*.

3. In such case, the *jury's* finding the defendant "*guilty*," is sufficient to authorize the *judgment of amotion from office*; but no farther testimony is admissible before the *Court* after the discharge of the Jury.

THIS was an adjourned case from the District Court of *Haymarket*, upon an information and verdict against *John Alexander*, a Justice of the Peace, in the county of *Loudoun*, for taking his seat (the 9th of *August*, 1803) "on the bench of the said County Court, and acting as a Justice and member of the Court then and there sitting, in giving his vote upon a judicial question and examination at the time depending in the said Court, and in signing the minutes of its proceedings, as presiding Justice thereof, while he the said *John Alexander* was in a state of intoxication, from the drinking of spirituous liquors, which rendered him incompetent to the discharge of his duty with decency, decorum and discretion, and disqualified him from a fair and full exercise of his understanding in matters and things, at the time and place last mentioned, judicially brought before him, to the great disgrace of the administration of public justice, and to the evil example of persons in authority; whereby the said *John Alexander* was guilty of *misbehaviour in his office of Justice of the Peace*, in and for the said County of *Loudoun*, against the peace and dignity of the Commonwealth."

The Jury found the defendant "*guilty*," and *amerced* him in the sum of *fifty dollars*. On the motion of the attorney for the Commonwealth for a judgment against the defendant for the amount of the amercement, and also for judgment that the defendant be *removed from his office* of Justice of the Peace, for the county of *Loudoun*, the District Court, "doubting whether it had authority to *remove* the defendant from his office aforesaid, and also whether evidence could be exhibited to the *Court*, after the discharge of the *Jury* before whom the issue was tried, to prove the general ill conduct and mal-administration of the defendant in his

said office, thereby to shew him to be a proper object for *removal*," adjourned the case to the General Court, for the novelty and difficulty of the said questions.

And now, at a General Court, holden at the Capitol, in the City of *Richmond*, on the thirteenth day of *June*, 1808, Present, JOHN TYLER, ROBERT WHITE, jun. FRANCIS T. BROOKE, HUGH HOLMES, ARCHIBALD STUART, and WILLIAM NELSON, Judges, the following opinion was entered on the points submitted.

" It is the *unanimous* opinion of this Court, that judgment of *amotion from the office of Justice of the Peace* ought to be rendered against the said *John Alexander*, and that no further testimony is admissible before the District Court."

" Which is ordered to be certified to the District Court, holden at *Haymarket*."

AN

INDEX

TO

THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A

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2. A suit brought by husband and wife to recover a demand in right of the wife, abates by her death. *Archer* v. *Colley and Wife*, 410
3. A decree of a preceding term against a defendant who was then dead, set aside on motion. *Hooe* v. *Barber et al.* 439

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1. Executors and administrators ought to be allowed, in their accounts, all reasonable charges and disbursements for the benefit of the estate they represent; and a reasonable

recompense for their personal trouble, in preference to the claim of any creditor of the decedent. *Nimmo's Executor* v. *The Commonwealth*, 57

2. *It seems*, that charges appearing to be just and legal, in an *ex parte* settlement of an administration account, by commissioners appointed by the court which granted the administration and passed by such court, (the commissioners having reported, that vouchers were produced to justify such charges,) are to be received, *prima facie*, as evidence in favour of the executor or administrator; and that the burden of proof lies on the party who would impugn them, *ib.*

3. When an administration account may be admitted as *prima facie* evidence. See *Atwell's Administrators* v. *Milton*, 253. and *Mountjoy* v. *Lowry*, 430

4. The act of 1792, (1 *Rev. Code*, p. 167. s. 56.) which makes it the duty of the court, in actions against executors or administrators on open accounts, to expunge such items as appear to have been due more than 5 years before the death of the testator or intestate, applies to accounts existing before the first of *October*, 1793, when that act took effect; (see 1 *Rev. Code*, c. 150. p. 293.) but it relates only to open accounts, and does not extend to settlements or assumptions; therefore the plaintiff, to take his case out of the act, may give in evidence an *assumpsit* of the testator or intestate, within five years, to pay a stated balance. *Brooke's Administrators* v. *Shelly*, 266

5. An order for an account, in chancery, must be executed within twelve months. *Anonymous*, 410

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12. A report made while a cause stood dismissed, and before it was reinstated, will be recommitted. *Williamson* v. *Childress*, 449

13. Objections for want of proof of any voucher on which a commissioner founds an item in his account must generally be made before the commissioner himself; in which case, if such proof be not supplied, it may be called for at the hearing, but in no other instance, unless for good cause shewn, and upon one month's previous notice. *Read's Ex'rs* v. *Winston and others*, 450

14. A motion for an account is irregular; it should be for a decree, which if the court cannot enter without an account, it will direct one. *Hampton's Ex'rs* v. *Pollard*, 451

An order for an account is not to be made as of course, but upon a hearing only, unless the parties consent; and where it would be proper, it should not be directed in vacation, without notice to the adverse party or his counsel. *Cutting and Wife* v. *Carter*, 478

15. After a decree for an account against a defendant who is in contempt, and a report of the commissioner, such defendant can be permitted to file his answer on condition only that he do not delay the trial. *Fisher* v. *Fisher*, 484

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16. Though it is a matter of course for a remainder-man of personal chattels to file a bill against tenant for life, for an account and inventory of the property, yet the court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear some danger of

its being wasted or put out of the way. *Mortimer* v. *Moffat and Wife*, 503

17. A defendant, after an order for an account, may move to set it aside, and file his answer, on paying the costs which may have accrued before the commissioner. *Lindsay* v. *Campbell and Wheeler and others*, 505

ACTION.

1. If the jury find, in a mill case, that a certain number of acres of land will be overflowed, "together with all other damages, to the value of a specified sum;" it is special enough, and will not bar an action for any damages not foreseen and estimated by them. *Coleman* v. *Moody*, 2
2. *Assumpsit* for the use and occupation of land lies, upon an express promise, at common law, independently of the stat. 11 *Geo.* II. *c.* 19. See ASSUMPSIT, No. 1. *Eppes* v. *Cole*, 191
3. *It seems*, that such action is also maintainable without proof of an express promise. But the point was left open in this case. *Ideo quære*, *ib.*
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1. The true construction of the law concerning the appointment and duties of sheriffs, requires that they should be annually nominated and commissioned, and should annually renew their bond for the faithful collection of the taxes, &c.; therefore in this case, the high sheriff having been nominated and commissioned for one year only, and having acted the second year without a new nomination and commission, and not having renewed his bond, it was held, that the securities for the first year were not liable for the taxes collected by the high sheriff for the second. *The Commonwealth* v. *Fairfax and others*, 208
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3. Construction of the act of 1796, c. 31. for paving the streets of *Alexandria*. See SUMMARY PROCEEDINGS, and *Mayor, &c. of Alexandria* v. *Chapman*, 270
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5. The second section of the act of 1st *February*, 1808, "concerning the sale of property under executions and encumbrances," applied to all sales made after that act took effect, under any decree in chancery, whether dated before that time or not. *Spencer* v. *Carter*, 402
6. An attachment to enforce a decree pronounced against a person who was out of the commonwealth at the time, cannot be awarded against him after his return, until twelve months have elapsed from the time of serving a copy of such decree. *Horton* v. *Horton*, 403

ADMINISTRATION.

An administration account, settled before commissioners appointed by the court, in which the executor or administrator qualified, and certified "to have been returned to court, and being examined, to have been allowed, and ordered to be recorded," is inadmissible, on the plea of *fully administered*, as *prima facie* evidence of the several items therein,

without producing also copies of the inventory and appraisement of the testator's or intestate's estate. But the adverse party may surcharge and falsify such account, if he can. *Atwell's Adm'rs* v. *Milton*, 253
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ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

AD QUOD DAMNUM.

1. An inquisition on a writ of *ad quod damnum*, in a mill case, having found that lands of *T. R.* deceased, would be overflowed, and a summons having issued to *T. C.* acting executor and trustee of the decedent, to shew cause why leave should not be given to erect the mill; and *T. C.* having appeared and contested the motion on its merits, he was precluded from afterwards saying that he was not legally summoned as the tenant or proprietor of the land. *Coleman* v. *Moody*, 2
2. The mentioning in the writ of *ad quod damnum*, a certain height for the mill dam is no ground for setting aside the proceedings at the instance of the opposing party; notwithstanding no particular height was specified in the order directing the writ, *ib.*
3. If the jury find that a certain number of acres of land will be overflowed, "together with all other damages, to the value of a specified sum," it is special enough, and will not bar an action for any damages not foreseen and estimated by them, *ib.*
4. An order of court granting leave to erect a mill is valid, though no order be made directing payment of the damages found by the inquisition, *ib.*
5. For what conduct of the jurors an inquisition in a mill case ought not to be set aside, *ib.*
See JURORS, No. 1.
6. It is sufficient for the clerk to state in the record, that the writ of *ad quod damnum* with the inquisition annexed, was returned by the sheriff, without inserting a copy of the signature of the sheriff, or of his deputy, to the return; a copy of the inquisition itself with the signatures of the jurors being inserted in the record, *ib.*

AFFIDAVIT.

1. If a defendant at law be ruled into a trial in the absence of some of his witnesses, to whose materiality he has made affidavit, he may except to the opinion of the court, and proceed to obtain relief in a superior court of common law, but not in chancery. *Syne and others* v. *Montague*, 180
2. Affidavits filed in support of a bill, (there being no proof of notice) ought not to be considered as testimony in the cause; unless it appear in the record that they were read, either by consent of parties, or without opposition, when such opposition might have been made. *Braxton* v. *Lee's Heirs*, 376

AGREEMENT.

1. If B. agree to sell W. so many acres of land, lying on a certain creek, &c. without specifying any boundaries; but a particular tract be shewn to W. as the land embraced by the agreement, and they accordingly enter into a contract under hand and seal; parol evidence is admissible to shew that B. either had no land at all on that creek, &c. or not that particular tract which it was understood by the parties was comprehended in the agreement. *Buster's Ex'rs* v. *Wallace*, 82
2. A vendor, having conveyed a tract of land by an absolute deed of bargain and sale, in which, and by a receipt at the foot whereof, he acknowledged that the consideration expressed was fully paid; having nevertheless taken the vendee's bonds for the amount thereof, and continued to live on the land, by virtue of a parol agreement that he should retain possession until the contract on the part of the vendee should be fully complied with; retained an equitable lien on the land against a purchaser from the vendee having actual notice of such agreement. *Dowd* v. *Bibb*, 113

ALIMONY.

1. The court of chancery has jurisdiction in cases of alimony. *Purcell* v. *Purcell*, 507

2. What evidence of marriage is deemed sufficient to entitle the wife to alimony. *Purcell* v. *Purcell*, 507
3. How the performance of decrees for alimony is to be enforced where the defendant stands out process of contempt, *ib.*

AMENDMENT.

1. Rules as to amending answers in chancery. *Liggon* v. *Smith*, 405
2. After special demurrer to a bill in chancery, the plaintiff may have leave to amend on payment of costs. *Rose* v. *King*, 475
3. An answer filed by an infant may be amended, on motion, when he attains his age. *Winston* v. *Campbell*, 477
4. A motion to be admitted as a defendant is not regular; but, in case of an injunction, if it appear that the person making the motion is interested in the subject of controversy, the court will order the injunction to be dissolved, unless the plaintiff will amend his bill, and make him a defendant. *Harrison* v. *Morton*, 483
5. After publication of depositions, and the cause set down for hearing, the original bill cannot be amended by making new parties, or charging a new fact; but a supplemental bill may be offered. *Pleasants* v. *Logan*, 489

AMERCEMENT.

1. A justice of the peace may be amerced and removed from office upon an information against him in a superior court of criminal jurisdiction, for misbehaviour in office. *The Commonwealth* v. *Alexander*, 522
2. Being intoxicated with spirituous liquors, while in the discharge of his official duties, is a sufficient misbehaviour for which a justice of the peace ought to be amerced and removed from office, *ib.*

AMOTION FROM OFFICE.

1. A justice of the peace may be amerced and removed from office upon an information against him in a superior court of criminal jurisdiction, for misbehaviour in office. *The Commonwealth* v. *Alexander*, 522
2. Being intoxicated with spirituous liquors, while in the discharge of his official duties, is a sufficient misbehaviour, for which a justice of the peace ought to be amerced and removed from office, *ib.*
3. In such case, the jury's finding the defendant "*guilty*," is sufficient to authorize the judgment of amotion from office; but no further testimony is admissible before the court, after the jury has been discharged, *ib.*

ANCESTOR.

See Heirs.

An heir is not bound for clerk's fees and taxes due from the ancestor. *Haydon* v *Goode et al* 460

ANSWER IN CHANCERY.

1. It should appear that defendants in chancery, against whom a decree is entered, had answered the bill, or stood out process of contempt; and, if this be omitted, a bill of review may be filed, on the ground of error upon the face of the decree. *Braxton* v. *Lee's Heirs*, 376
2. Rules as to amending answers. *Liggon* v *Smith*, 405
3. If an answer contain impertinent or scandalous matter, it will be referred to a commissioner to expunge such matter, at the costs of the party filing the answer. *Mason* v. *Mason et al.* 414
4. On what terms the answer of a defendant, against whom there had been a decree as an absentee, may be received. *Hooe* v. *Barber et al.* 439
5. An answer filed by an infant may be amended, on motion, when he attains his age. *Winston* v. *Campbell*, 477
6. A verdict obt
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Verdier v. *I*
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8. In such case, if the injunction be not reinstated, the bill is to be dismissed under the act of assembly, unless cause be shewn against it at the ensuing term after the coming in of the answer. *Beall* v. *Gibson*, 481
9. Practice as to bringing in the defendant, by a messenger, to answer interrogatories. *Brown, Rives & Co.* v. *Wilson*, 481
10. After a bill of injunction has been taken for confessed for want of an answer, a motion will not be received to discharge it as having been improvidently awarded. *Turpin, Adm'r of James*, v. *Jefferson*, 483
11. After a decree for an account against a defendant who is in contempt, and a report of the commissioner, such defendant can be permitted to file his answer, on condition only that he do not delay the trial. *Fisher* v. *Fisher*, 484
12. A defendant, after an order for an account, may move to set it aside, and file his answer, on paying the costs which may have accrued before the commissioner. *Lindsay* v. *Campbell & Wheeler and others*, 505

APPEAL.

1. In every case of an appeal in a controversy concerning the probate of a will, the original paper exhibited for probate ought to be brought before the appellate court, by writ of *subpœna duces tecum*. If such paper cannot be had, the order admitting it to record, or rejecting it, ought neither to be affirmed nor reversed; but the appeal should be dismissed. *Marks and Wife* v. *Bryant and Wife*, 91
2. An appeal will not be taken up as a delay case, if the point be in any degree doubtful. *Fox* v. *Govan*, 156

See BILL OF EXCEPTIONS, No. 1.

3. If a cause be remanded to an inferior court, and a new trial directed, the superior court must be presumed to have thought the declaration sufficient; consequently, on the new trial, or on a second appeal, no exception can be taken to the declaration. *Murdock, &c.* v. *Herndon's Ex'rs*, 200
4. If a superior court of common law, in reversing a judgment and awarding a new trial, assign the reason to be, that certain evidence should have been received on the former trial, but fail to direct that, upon the new trial, such evidence shall be received, the court of appeals, in affirming its judgment, will add the proper direction concerning the evidence. *Brooke's Adm'rs* v. *Shelly*, 266
5. If one of two co-executors direct an appeal, writ of error or *supersedeas*, originally granted to them both, to be dismissed, the other may proceed without him, and since both are before the court, an order of severance may be made without a summons. *Reno's Ex'rs* v. *Davis and Wife*, 288
6. If the clerk of an inferior court misconceive a judgment, and issue execution against any person not properly a party thereto, the remedy is not by *supersedeas* or writ of error, but by motion to quash the execution; and if such motion be overruled, an appeal may be taken to the court of error, or application may be made for a writ of error or *supersedeas* to the order overruling such motion. *Moss and others* v. *Moss's Adm'rs*, 293
7. An interlocutory decree being affirmed in the court of appeals does not change its terms; but it remains to be executed in the court of chancery in the same manner as before the appeal; therefore, in this case, the appeal being affirmed without a deduction of war interest on a *British* debt, such deduction will be made in the court of chancery, especially as the plaintiff is asking the aid of that court to carry the decree into effect. *Wilson* v. *Triplett*, 433
8. Practice where the appellees took possession of the property belonging to the intestate of the appellant, pending the suit. *Wright* v. *Wright et al.* 452
9. A plaintiff in a superior court of chancery cannot be ruled to give security for costs incurred in the court of appeals from which the suit was remanded for farther proceedings. *Lambert* v. *Key*, 484
10. If a party prosecute his action at law, and there be a decision of an inferior court against him, from which he takes an appeal, but does not prosecute it, he cannot come into equity for relief, on the same subject matter. *Saunders* v. *Marshall et al.* 455
11. A suit in equity cannot be maintained for profits of slaves accruing during

the pendency of an appeal from a judgment in *detinue*. *Alderson* v. *Biggars and others*, 470

APPEARANCE.

1. An inquisition on a writ of *ad quod damnum*, in a mill case, having found that lands of *T. R.* deceased, would be overflowed, and a summons having issued to *T. C.* acting executor and trustee of the decedent, to shew cause why leave should not be given to erect the mill; and *T. C.* having appeared and contested the motion on its merits, he was precluded from afterwards saying that he was not legally summoned as the tenant or proprietor of the land. *Coleman* v. *Moody*, 2
2. What is the appearance day in the superior court of chancery. *Smith* v. *Jenny et al.* 440
3. Practice as to executing attachments to compel an appearance. *Watts's Ex'rs* v. *Robertson*, 442

APPRAISEMENT.

When an administration account, settled before commissioners, may be admitted as *prima facie* evidence, without exhibiting also a copy of the inventory and appraisement. See *Atwell's Adm'rs* v. *Milton*, 253

ARGUMENT.

In chancery proceedings, when a plea is set down for argument, the cause must be put on the court docket. *Hill* v. *Green*, 448

ASSEMBLY.

See GENERAL ASSEMBLY.

ASSETS.

1. If an executor exhaust the assets by paying debts of inferior dignity, he must satisfy a judgment against his testator *de bonis propriis*. See EXECUTORS AND ADMINISTRATORS, No. 2. *Nimmo's Ex'rs* v. *The Commonwealth*, 57
2. The proceeds of the sale of land, directed by the will of the testator to be sold for the payment of his debts, are equitable assets, and should be distributed among all the creditors *pari passu*; nor are such assets proper subjects for the cognisance of a court of law. *Nimmo's Ex'rs* v. *The Commonwealth*, 57
3. In suits to subject to the payment of debts, lands in the possession of heirs, the constant course, where there is no specific lien, is first to take an account of the personal assets. *M'Loud* v. *Roberts and others*, 443
4. But the case is otherwise where there is a specific lien; for a mortgagee cannot be compelled, in order to get hold of the mortgaged subject, to go into an account of the personal assets. *Patton* v. *Page*, 449
5. A simple contract creditor shall receive, out of the real assets descended to the heirs at law, as much as has been paid to bond creditors out of the personal assets. *Haydon* v. *Goode et al.* 460
6. An injunction in favour of an executor or administrator, on the ground of a deficiency of assets, should not be perpetual; but only until assets shall come to his hands to satisfy the judgment, or any part thereof; reserving to the creditor liberty to shew such assets by a *scire facias* at law, *ib.*
7. In a suit in equity against executors, it is not regular to enter a decree to be levied of the goods of the testator, without an account. *M'Rae* v. *Bates*, 490

ASSIGNEE.

The assignee of a bond or note is not bound to sue the maker, if he be notoriously insolvent, before he can resort to the assignor. *Saunders* v. *Marshall et al.* 455

ASSIGNMENT.

1. After a *bona fide* assignment of a bond, and notice thereof to the obligor, he cannot be restrained by an attachment in chancery at the suit of a creditor of the obligee from paying the debt to the assignee, notwithstanding the *subpœna*, with the usual endorsement by the clerk, was served upon

him before he received such notice, and afterwards (but before he answered the bill) the court made an order restraining him from paying the debt which he owed the defendant. Therefore, in this case, the obligor (though previously served with the *subpœna*) having received notice of the assignment shortly after the bond became payable, and failing for nearly six years to answer the bill, which was filed before the notice was given, was not allowed in a suit against him by the assignee any deduction of interest between the day when the bond became payable, and that when the restraining order was set aside. *Tazewell's Ex'rs* v. *Barrett & Co.* 259

2. An assignment of a breach, in debt on bond, with a collateral condition, commencing "and whereas," and continuing by way of recital to the end, is insufficient; and fatal after general demurrer. *Syme* v. *Griffin*, 277

ASSUMPSIT.

1. *Assumpsit* for the use and occupation of land, by permission and assent of the plaintiff on an express promise to pay the plaintiff a certain sum, or in general terms, to pay him to his satisfaction for such use and occupation, lies at common law, independently of the stat. 11 *Geo.* II. *c.* 19. *Eppes's Ex'rs* v. *Cole and Wife*, 161
2. *It seems*, that such action is also maintainable without proof of an express promise. But the point was left open in this case. *Ideo quære*, *ib.*
3. The act of 1792, (1 *Rev. Code*, p. 167. s. 56.) which makes it the duty of the court, in actions against executors or administrators on open accounts, to expunge such items as appear to have been due more than 5 years before the death of the testator or intestate, applies to accounts existing before the first of *October*, 1793, when that act took effect; (see 1 *Rev. Code*, c. 150. p. 293.) but it relates only to open accounts, and does not extend to settlements or assumptions; therefore the plaintiff, to take his case out of the act, may give in evidence an *assumpsit* of the testator or intestate, within five years, to pay a stated balance. *Brooke's Adm'rs* v. *Shelly*, 266

ASSURANCES.

To what extent usurious assurances may be enforced in a court of equity. *Marks* v. *Morris*, 463

ATTACHMENT.

1. If a mortgagee obtain a judgment at law upon any attachment against the mortgagor, as an absconding debtor, attempting to defraud the mortgagee of his security by removing the property out of the state; and purchase it under execution thereupon; the mortgagor shall not be permitted to redeem. See JUDGMENT, No. 4. *Dabney and others* v. *Green*, 101
2. After a *bona fide* assignment of a bond, and notice thereof to the obligor, he cannot be restrained by an attachment in chancery at the suit of a creditor of the obligee from paying the debt to the assignee, notwithstanding the *subpœna*, with the usual endorsement by the clerk, was served upon him, before he received such notice; and afterwards (but before he answered the bill) the court made an order restraining him "from paying the debt he owed the defendant." Therefore, in this case, the obligor (though previously served with the *subpœna*) having received notice of the assignment shortly after the bond became payable, and failing for nearly six years to answer the bill, (which was filed before the notice was given,) was not allowed (in a suit against him by the assignee) any deduction of interest between the day when the bond became payable, and that when the restraining order was set aside. *Tazewell's Ex'rs* v. *Barrett & Co.* 259
3. An attachment to enforce a decree pronounced against a person who was out of the commonwealth, cannot be awarded against him after his return, until twelve months have elapsed from the time of service of a copy of such decree. *Horton* v. *Horton*, 403
4. In what manner an attachment for not performing a decree of the court of

chancery ought to be executed. *Lane* v. *Lane*, 437
5. How *subpœnas* on foreign attachments should be endorsed. *Smith* v. *Jenny et al.* 440
6. Practice as to executing attachments to compel an appearance. *Watt's Ex'rs* v. *Robertson.* 442
7. How decrees on foreign attachments should be entered, *ib.*
8. *Quære*, whether a sheriff is liable to an attachment for not executing and returning the process of the courts of chancery. *Ronald* v. *Bentley et al.* and *Harmer* v. *Key*, 461
9. The time allowed by a decree against an absent defendant, within which he might shew cause against it, having expired, the plaintiff is entitled to the benefit of the decree, without giving the security originally required by it. *Ross* v. *Austin*, 502
10. A home defendant, decreed to pay money to a creditor of an absent defendant, will be compelled to pay interest, unless he make a legal tender, or bring the money into court, *ib.*

ATTORNEY IN FACT.

No particular form of words is necessary in the signature of a deed by an attorney in fact; provided the act be done in the name of his principal. It is therefore indifferent whether he sign it "*B. W.* attorney for *R. C.*" or "*R. C.* by *B. W.* his attorney." *Jones's Devisees* v. *Carter*, 184

AUTHORITY.

English decisions are regarded by the superior court of chancery for the *Richmond* district, for the sake of information merely, but not as authority. *Marks* v. *Morris*, 463

AVERMENT.

1. Construction of the term averment in the act of assembly relating to dower. *Ambler and Wife* v. *Norton*, 23
2. In averring a jointure in bar of dower, the failure to state in the plea that the husband "being seised in fee of the premises" made the jointure, is not a substantial defect. See DOWER, No. 2. *Ambler and Wife* v. *Norton*, 23
3. See DOWER, No. 5. *ib.*
4. In equity, either party to a deed may aver and prove against the other, or against a purchaser with notice, the true consideration on which it was founded, though a different consideration be mentioned therein; but a *bona fide* purchaser, without notice of the existence of such consideration, is not to be affected thereby. *Duval* v. *Bibb*, 113
5. In debt on bond with collateral condition, an assignment of a breach commencing "and whereas, &c." and continuing by way of recital to the end, without any direct averment, is insufficient; and such error is fatal on general demurrer. *Syme* v. *Griffin*, 277

AWARD.

1. In a suit in chancery to set aside an award on the ground of a mistake of the arbitrators, the defendant by his answer consenting that the award may be opened and an account taken (if the complainants choose) from the beginning, but at any rate, as to certain particulars specified by himself; he is bound to abide by a statement thereupon made by a commissioner of the court, refusing to open the account (on his motion) from the beginning, and professing only to correct the mistake alleged by the complainants; (notwithstanding such mistake be not proved independently of the report of the commissioner;) no evidence having been offered by the said defendant as to the particulars specified by him, and no objection to such report appearing, except that the account was not opened from the beginning. *Scott's Ex'rs* v. *Trents, Crump & Bates*, 356
2. Although consent of parties cannot give jurisdiction to a court of equity, yet (after an injunction granted improperly) if the parties refer all matters in difference between them, in that suit, to certain arbitrators mutually chosen, consenting that their award may be made the decree of

the court, such consent is binding; the whole case, including the question of law, being thereby transferred from the court to the arbitrators. *Brickhouse* v. *Hunter, Banks & Co.* 363

3. An award is not the less certain and final, because the arbitrators refer to a report previously made by a commissioner in chancery, and declare (in general terms) their concurrence with it, instead of specifying the particulars, or substance thereof, in the award itself; nor because they submit to the court the propriety of their award in point of law, and as a guide for the court in deciding upon it, state the grounds and reasons thereof, *ib.*

B

BAILMENT.

A consignee of goods may dispose of them in the way of trade, but he cannot pawn them for his own benefit, so as to devest the property of the consignor. In this case, the facts being clear, the consignors (the plaintiffs) are not to be turned round to a court of law; but a decree may be entered in their favour at once, against the pawnees. *Skinner & Co.* v. *Dodge & Cobb,* 432

BANK STOCK.

It is not usury to sell bank stock at a very high price; since to constitute usury, there must be a treaty for the loan or forbearance of money. *Skipwith* v. *Gibson & Jefferson,* 490

BAR.

1. Fiduciary possession cannot prevent length of time from being a bar, unless it was fiduciary as to the plaintiff or those under whom he claims. *Spotswood* v. *Dandridge and others,* 139

See Possession, No. 1.

2. See Legatees, No. 1. *Ibid.* 140

4

3. A verdict at law against a party is no bar to a decree in his favour, if he be brought into chancery by the adverse party; otherwise, if he were the plaintiff in equity. *Jones* v. *Jones,* 447

4. How far a judgment at law is a bar to a subsequent suit at law, or in equity, against the party in whose favour such judgment was rendered. *Saunders* v. *Marshall et al.* 455

BARGAIN AND SALE.

1. Notwithstanding a deed of absolute bargain and sale, the vendor, under circumstances, may retain an equitable lien. *Duval* v. *Bibb,* 113

See Lien, No. 2.

2. See Conveyance, No. 2. *Duval* v. *Bibb,* 113

BARON AND FEME.

See Husband and Wife.

BILL IN CHANCERY.

1. The chancellor, on dissolving an injunction, ought not to dismiss the bill without the consent of the complainant. See Injunction, No. 1. *Blow* v. *Taylor,* 159

2. A bill against a defendant, not an inhabitant of this country, and having no property therein, cannot be sustained. *Hopkirk* v. *Bridges,* 413

3. In a bill for an injunction, where relief might have been had at law, the plaintiff must state why he did not defend himself at law. *Yancey* v. *Fenwick,* 423

4. In what case a creditor, on filing his bill, may at once prove his claim. *Anderson* v. *Anderson and others,* 475

5. After special demurrer to a bill, the plaintiff may have leave to amend on payment of costs. *Rose* v. *King,* 475

6. On a bill taken as confessed, the plaintiff cannot obtain a final decree, without filing his documents, and proving his case. *Anonymous,* 476

7. A bill for discovery lies in cases only where the plaintiff's right cannot be established without the discovery sought for. It does not lie, there-

fore, to discover the name of a negro child whose mother is known, nor the profits of slaves, of which a jury are the best judges. *Bass* v. *Bass*, 478

8. A bill of revivor is unnecessary, where a mere revival of the suit is sought; a *scire facias* being sufficient. *Vaughan and Wife* v. *Wilson's Ex'r*, 480
9. After a bill of injunction has been taken for confessed for want of an answer, a motion will not be received from the defendant to discharge it, as having been improvidently awarded. *Turpin, Adm'r of James*, v. *Jefferson*, 483
10. After publication of depositions, and the cause set for hearing, the original bill cannot be amended by making new parties, or charging a new fact; but a supplemental bill may be offered. *Pleasants* v. *Logan*, 489
11. It is a matter of course for a remainder-man of personal chattels to file a bill against tenant for life, for an account and inventory of the property, but the court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear some danger of its being wasted or put out of the way. *Mortimer* v. *Moffat and Wife*, 503
12. A sheriff may file a bill of interpleader to settle the rights of property, taken in execution, to which there are conflicting claims; but an injunction will not be awarded to stay any suit against him, in case of his selling the property. *Storrs* v. *Payne and others*, 506

BILL OF EXCEPTIONS.

1. Although a palpably frivolous bill of exceptions to the opinion of the court below is not sufficient to prevent the court of appeals from taking up a cause out of its turn on the docket as a delay case; yet, if the point be in any degree doubtful, it will not be so taken up. *Fox* v. *Govan*, 156
2. A bill of exceptions may be filed to the opinion of an inferior court in granting or refusing a continuance, and the superior court has a right to determine whether a sound discretion was exerted. *Hook* v. *Manny and others, in note*, 157

See CONTINUANCE, No. 1.

See also *Syme and others* v. *Montague*, 180

BILL OF REVIEW.

It should appear that defendants in chancery, against whom a decree is entered, had answered the bill, or stood out process of contempt; and, if this be omitted, a bill of review may be filed, on the ground of error, upon the face of the decree. *Braxton* v. *Lee's Heirs*, 376

BILL OF SALE.

Under circumstances a bill of sale, though absolute on its face, will be deemed a mortgage; the true question always being whether a purchase of the property, or a loan of money or forbearance of a debt were intended. *Dabney, &c.* v. *Green*, 101

☞ In this case, the circumstances proving the bill of sale to have been intended as a mortgage were gathered from other writings and acts of the parties, *ib.*

BOND.

See FORTHCOMING BOND.

1. Bond and security for complying with the requisitions of the act of congress on removing a cause from a state court to the circuit court of the *United States*, may be given, though the defendant be not personally present. *Brown* v. *Crippin and Wise*, 173
2. A bond taken by the sheriff, of a debtor in custody, conditioned that such debtor shall keep within certain prison bounds, "until he shall have discharged the debt and costs, and save harmless the said sheriff," is illegal and void. It should be, simply, "that he shall not depart or go out of the rules or bounds of the prison to which he was committed." *Syme* v. *Griffin*, 277
3. What is a sufficient assignment of a breach, in debt on a bond given by distributees to an administrator, to indemnify him for dividing an estate. See *Moss and others* v. *Moss's Adm'r*, 293
4. Where there was an action on a joint and several bond against six obligors, and the *capias* (which was against them all) was executed on two only,

it was held that the plaintiff was not bound to sue out further process against the rest, but might take judgment against those two. In such case it seems indifferent whether the declaration be against those two only, or against all named in the writ, provided the bond be properly described. *Moss and others* v. *Moss's Adm'r*, 293

5. The assignee of a bond or note is not bound to sue the maker, if he be notoriously insolvent, before he can resort to the assignor. *Saunders* v. *Marshall et al.* 455

6. A simple contract creditor shall receive out of the real assets descended to the heirs at law, as much as has been paid to bond creditors out of the personal assets. *Haydon* v. *Goode et al.* 460

BOUNDARIES.

1. Natural or reputed boundaries, or lines of marked trees, ought to be established in preference to mere course and distance, or to mistaken descriptions in surveys or conveyances. *Dogan* v. *Seekright, Lessee of Carter*, 125

2. It seems to be matter of law, on which the court, if either party require it, should instruct the jury, that a marked line shall prevail over one which was never marked, *ib.*

BREACH.

1. In assigning a breach of covenant, it is not necessary to do it in the very words of the covenant; the intention of the parties to be collected from the instrument may alone be stated. *Buster's Ex'r* v. *Wallace*, 82

2. But even if a breach be badly assigned, it will be aided after a verdict for the plaintiff on an issue joined on the plea that the defendant had not broken the covenant, *ib.*

3. In debt on bond with collateral condition, an assignment of a breach commencing "and whereas," &c. and continuing by way of recital to the end, without any direct averment, is insufficient, and such error is fatal on general demurrer. *Syme* v. *Griffin*, 277

4. What shall be a sufficient assignment of a breach, in debt on a bond given by distributees, to indemnify an administrator. See *Moss and others* v. *Moss's Adm'r*, 293

C

CERTAINTY.

Reasonable certainty with respect to the locality and identity of the land, is all that is requisite in pleading a jointure in bar of dower. See LANDS, No. 2. *Ambler and Wife* v. *Norton*, 23

CERTIFICATE.

The court of appeals will direct their clerk to grant a certificate of their judgment, during term time, if it be absolutely necessary to attain the justice of the case. *Brown* v. *Crippin and Wise*, 173

CERTIORARI.

A copy of the record must accompany every application for a *certiorari*. *Triplett* v. *Tyler*, 413

CHANCERY.

See EQUITY.

1. The vendee or his legal representatives ought to be parties to a suit in chancery brought by the vendor against a subsequent purchaser, to recover a balance alleged to be due from the vendee. *Duval* v. *Bibb*, 113

2. The chancellor, on dissolving an injunction, ought not at the same time, to dismiss the bill, without the complainant's consent. See INJUNCTION, No. 1. *Blow* v. *Taylor*, 159

3. An error committed by an inferior court in ruling a defendant at law into a trial in the absence of his witnesses, ought to be corrected by a superior court of common law, but not in chancery. See AFFIDAVIT, No. 1. *Syme and others* v. *Montague*, 180

4. It is not necessary to state in a decree in chancery, that all the preliminary steps towards maturing the cause for hearing were taken; it being intended, where the cause was set for hear-

ing, that it was regularly done, unless the party attempting to impugn the decree shew the contrary. *Quarrier* v. *Carter's Representatives*, 242

5. The superior courts of chancery have power (upon general principles of equity) to direct the *venue* to be changed, after issue joined, in a county or other inferior court, where it appears that strong prejudices existed against the defendant, which were unknown to him till after such issue was joined, and that a fair and impartial trial could not be expected in the court where the suit was depending. *Darmsdatt* v. *Wolfe*, 246
6. In such cases, it is not necessary that there should have been a judgment to authorize the chancellor to grant the injunction, *ib.*
7. A discovery, since a trial at law, of new evidence, which with ordinary diligence the party might have known and obtained in time, is not a sufficient ground for a court of equity to grant a new trial. *Delima* v. *Glassell's Adm'r*, 369
8. Affidavits filed in support of a bill (there being no proof of notice) ought not to be considered as testimony in the cause; unless it appear in the record that they were read, either by consent of parties, or without opposition, when such opposition might have been made. *Braxton* v. *Lee's Heirs*, 376
9. It should appear that defendants in chancery, against whom a decree is entered, had answered the bill, or stood out process of contempt; and if this be omitted, a bill of review may be filed on the ground of error upon the face of the decree, *ib.*
10. Where a purchaser comes into a court of equity for relief against a judgment at law, on the ground of a defect in the vendor's title, to part of the tract of land purchased, it is not enough for him to *allege* such defect or want of title, he must prove an actual eviction, or superior title in some other person. *Yancey* v. *Lewis*, 390
11. A bill against a defendant not a resident of this country, and having no property therein, cannot be sustained. *Hopkirk* v. *Bridges*, 413
12. In a bill for an injunction, where relief might have been had at law, the plaintiff must state why he did not defend himself at law. *Yancey* v. *Fenwick*, 423
13. An interlocutory decree being affirmed by the court of appeals does not change its terms; but it remains to be executed in the court of chancery as before the appeal; therefore, in this case, the appeal being affirmed without a deduction of war interest on a *British* debt, such deduction will be made in the court of chancery, especially as the plaintiff is asking the aid of that court to carry the decree into effect. *Wilson* v. *Triplett*, 433
14. Practice as to bringing in the defendant by a messenger, to answer interrogatories. *Brown, Rives & Co.* v. *Wilson*, 481
15. A commission to examine one of the defendants as a witness, should be awarded on the motion of the plaintiff, as a matter of course, saving all just exceptions. *Plainville* v. *Brown and others*, 482

CIRCUIT COURT OF THE UNITED STATES.

1. It is a matter of right in the defendant, who is a non-resident of a state, and is sued in a state court, to remove the cause to the circuit court of the *United States*. See MANDAMUS, No. 1. *Brown* v. *Crippin and Wise*, 173
2. Bond and security for complying with the requisitions of the act of congress, on removing a cause from a state court to the circuit court of the *United States*, may be given, though the defendant be not personally present, *ib.*

CLERKS.

An heir is not bound for clerk's fees and taxes due from the ancestor. *Haydon* v. *Goode et al.* 460

COMMISSIONERS.

1. See ACCOUNT, No. 2. *Nimmo's Ex'r* v. *The Commonwealth*, 57
2. What evidence ought to be required by a commissioner, as to certain items of disbursements. *Miller* v. *Beverleys*, &c. 415
3. For what misconduct or mistake in commissioners, under a decree in

chancery, their proceedings will be set aside. *Spencer* v. *Carter*, 402
4. Allowance to commissioners appointed to divide lands under a decree of the court. *Cabell* v. *Cabell et al.* 436
5. A commissioner's report, under an order made when the representatives of a deceased party were not before the court, will be set aside. *Duguid* v. *Patterson*, 445
6. A report shewing a balance due from a defendant is not a sufficient ground for an order directing the money to be brought into court. *Campbell* v. *Braxton and others*, 445
7. If a party have an account taken as to a subject before decided by the court in the same cause, so much of the commissioner's report will be at the costs of such party. *Corbin* v. *Beverley and others*, 448
8. A report made while a cause stood dismissed, and before it was reinstated, will be recommitted. *Williamson* v. *Childress*, 449
9. Where lands are decreed to be sold for payment of debts, the deeds to purchasers are to be executed by the commissioners who conduct the sale. *Wilkinson's Adm'r* v. *Oliver's Representatives*, 450
10. At what time, and in what manner, objections, for want of proof of vouchers exhibited to commissioners, ought to be made. *Read's Ex'rs* v. *Winston et al.* 450
11. In what case a creditor may prove his claim before a commissioner at once on filing his bill. *Anderson* v. *Anderson and others*, 475
12. A defendant, after an order for an account, may move to set it aside, and file his answer, on paying the costs which may have accrued before the commissioner. *Lindsay* v. *Campbell & Wheeler and others*, 505

COMMISSIONS

1. Allowed to trustees for executing the trust. *Miller* v. *Beverley*, 415
2. To commissioners appointed to divide lands under a decree of the court. *Cabell* v. *Cabell et al.* 436

COMMISSIONS TO TAKE DEPOSITIONS.

After a cause has been argued, a commission to take depositions cannot be obtained but upon the affidavit of the party, and by special order of the court for that purpose. *Anonymous*, 409

COMMITTEE.

A wife being a lunatic, and put under the care of a committee by the county court, will be restored to her husband by a decree of the superior court of chancery, upon his giving bond and security according to law. *Coleman's case*, 506

COMMON LAW.

1. An action lies at common law against a sheriff for not executing and returning the process of the courts of chancery. *Ronald* v. *Bentley et al.* and *Harmer* v. *Key*, 461
2. The proper line of demarcation between the jurisdictions of courts of law and equity. *Alderson* v. *Biggars and others*, 470
3. Unless the plaintiff can shew, from some peculiar circumstances not within his control, that he could not be relieved at law, he shall not be permitted to come into a court of equity. *Nicholson & Heth* v. *Hancock and others*, 491

COMMONWEALTH.

1. The acts of limitations do not extend to the commonwealth unless expressly mentioned. *Nimmo's Ex'r* v. *The Commonwealth*, 57

See LIMITATIONS, No. 1.

2. No length of time can bar the commonwealth from execution on a judgment in her favour, nor even render it necessary to sue out a *scire facias* to entitle her to such execution, *ib.*

COMPENSATION

1. Allowed to trustees for executing the trust. *Miller* v. *Beverley*, 415
2. To commissioners appointed to divide lands under a decree of the court. *Cabell* v *Cabell et al.* 436

CONDITION.

If a jointure be subject to any condition

ther than the law annexes to dower, and therefore be not a bar to the writ of dower, the demandant must shew this by a replication to the plea of the tenant. See REPLICATION, No. 1. *Ambler and Wife* v. *Norton*, 23

CONFESSION.

1. On a bill taken as confessed, the plaintiff cannot obtain a final decree, without filing his documents, and proving his case. *Anonymous*, 476
2. After a bill of injunction taken for confessed, a motion will not be received to discharge it as having been improvidently awarded. *Turpin, Adm'r of James*, v. *Jefferson*, 483

CONSENT

Of parties is requisite to authorize an order for an account before the hearing of a suit in chancery. *Cutting and Wife* v. *Carter*, 478

CONSIDERATION.

1. Notwithstanding an absolute deed of bargain and sale, and a receipt at the foot thereof, in full for the consideration expressed therein, the vendor, under circumstances, may retain an equitable lien on the land for the purchase-money. *Duval* v. *Bibb*, 113

See LIEN, No. 2.

2. In equity, either party to a deed may aver and prove against the other, or against a purchaser with notice, the true consideration on which it was founded, though a different consideration be mentioned therein; but a *bona fide* purchaser, without notice of the existence of such consideration, is not to be affected thereby, *ib.*
3. A marriage settlement on a wife with whom the husband had long lived in a state of fornication, and by whom he had several children, will be deemed not to have been on valuable consideration, but voluntary and fraudulent as to creditors. *Greenhow* v. *Coutts and others*, 485

CONSIGNOR AND CONSIGNEE.

A consignee of goods may dispose of them in the way of trade, but he cannot pawn them for his own benefit, so as to devest the property of the consignor. In this case, the facts being clear, the consignors (the plaintiffs) are not to be turned round to a court of law; but a decree may be entered in their favour at once, against the pawnees. *Skinner & Co.* v. *Dodge & Cobb et al.* 432

CONSTRUCTION

1. Of the act of descents, as to the mother's inheriting the estate from an infant child, on whom it descended from the great uncle of the infant. *Owen* v. *Cogbill and others*, 487
2. Of wills. See WILLS, and *Reno's Executors* v. *Davis and Wife*, 288
3. Of statutes generally. See ACTS OF ASSEMBLY.

CONTEMPT.

1. After a decree for an account against a defendant who is in contempt, and a report of the commissioner, such defendant can be permitted to file his answer on condition only that he do not delay the trial. *Fisher* v. *Fisher*, 484
2. While a defendant is in contempt, no plea or demurrer can be admitted, but upon motion in open court. *Lane* v. *Ellzey*, 504
3. A defendant's being in contempt to the first process of the court is not a contempt to the decree, and forms no objection to his pleading to a *scire facias* brought to revive that decree, *ib.*
4. How the performance of decrees for alimony is to be enforced, where the defendant stands out process of contempt. *Purcell* v. *Purcell*, 507

CONTINUANCE.

1. A court, in granting or refusing a continuance of a cause, ought to exercise a sound discretion. If, therefore, a party be ruled into a trial when it appears from the facts stated in a bill of exceptions that he was entitled to a continuance, the judgment obtained against him will, for that cause, be reversed by a superior court. *Hook* v. *Nanny and others, in a note*, 157

2. On the dissolution of an injunction, the complainant has a right to continue [illegible]e as an original suit. See INJUNCTION, No. 1. *Blow* v. *Taylor*, 159

CONTRACT.

1. In cases of usury, the borrower filing his bill in equity is entitled to relief, not against the contract entirely, but to the amount of all but the principal money; the lender being entitled to receive his principal, without any interest. *Marks* v. *Morris*, 463
2. In such cases, though relief be given against the interest, the usurious assurances remain as a security for the principal; and the court will direct them to be enforced to that extent, if it be not paid by a given day, *ib.*

CONVEYANCE.

1. A vendor having conveyed a tract of land by an absolute deed of bargain and sale may yet retain an equitable lien on the land for the purchase-money, under circumstances. *Duval* v. *Bibb*, 113

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2. In equity, either party to a deed may aver and prove against the other, or against a purchaser with notice, the true consideration on which the deed was founded, though a different consideration be mentioned therein; but a *bona fide* purchaser, without notice of the existence of such consideration, is not to be affected thereby, *ib.*
3. Natural or reputed boundaries, or lines of marked trees, ought to be established in preference to mere course and distance, or to mistaken descriptions in surveys or conveyances. *Dogan* v. *Seekright, Lessee of Carter*, 125
4. Se BOUNDARIES, No. 2. *ib.*
5. A conveyance of land by two out of three executors, all of whom qualified and were living, (the testator having directed the sale and conveyance by his executors, in general terms,) is not valid in law, and cannot be aided in equity: nor would the payment of the purchase-money, in such case, create any lien on the land. *M'Rae* v. *Farrow*, 444
6. Where a sale of lands is directed by a court of equity, the deeds to purchasers are to be executed by the commissioners. *Wilkinson's Adm'rs* v. *Oliver's Representatives*, 450
7. Where an infant is directed to join in a conveyance, or to do any other act, he must have six months allowed him after he attains his full age, to shew cause against the decree, *ib.*

CORPORATIONS.

1. How far the general assembly has power, from time to time, to annul or alter acts of incorporation. *Currie's Adm'rs* v. *Mutual Assurance Society*, 315
2. A member of the *Mutual Assurance Society against fire*, is bound by an act of assembly varying the terms of the original act of incorporation; such act being passed at the instance of a legally constituted meeting of the said society; although that individual member was not present at the meeting, *ib.*
3. Where an act of incorporation provides that there shall be "three directors, out of whom a president shall be chosen," it is sufficient if the president be elected by a legally constituted meeting, and at the same time with the other directors; without having been previously appointed a director, *ib.*

COUNTY.

In pleading a jointure in bar of dower, it is not necessary to specify the name of the county in which the jointure land lies; provided the locality and identity of the land be described with reasonable certainty. *Ambler and Wife* v. *Norton*, 23

COUNTY COURT.

1. *Quære*, whether a *mandamus* lies from the superior courts of chancery to a county court, compelling the justices to hear and determine a cause where there has been unreasonable delay? *Webb* v. *Barbour*, 462
2. Practice where the plaintiff is proceeding in a superior court of chancery, and on the equity side of a county court for the same cause of

action. *Johnston* v. *Bower and others*, 476. 487

3. A wife, being a lunatic, and put under the care of a committee by the county court, will be restored to her husband by a decree of the superior court of chancery upon his giving bond and security according to law. *Coleman's case*, 506

COURT.

1. A court is not bound to give instructions on general and abstract propositions; but only on the actual case before them. *Buster's Executor* v. *Wallace*, 82
2. If depositions offered as evidence in a court of law contain matter supposed to be exceptionable, the proper course is to point out the exceptionable passages, and then move the court to instruct the jury to disregard such passages, *ib.*
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COURT OF APPEALS.

1. See APPEAL, No. 1. *Marks and Wife* v. *Bryant and Wife*, 91
2. The court of appeals will not take up a cause out of its turn on the docket, as a delay case, if the point be in any degree doubtful. *Fox* v. *Govan*, 156

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COURT OF CHANCERY.

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6. A court of equity ought not to interpose in the case of a nuisance, except where the law would not afford an immediate, nor an adequate remedy, until irreparable injury might be done. *Wingfield* v. *Crenshaw*, 474
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12. The court of chancery has jurisdiction in cases of alimony. *Purcell* v. *Purcell*, 507

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3. Practice where the plaintiff is proceeding in a superior court of chancery, and on the equity side of a county court for the same cause of action. *Johnston* v. *Bower and others*, 476
4. A justice of the peace may be amerced and removed from office upon an information against him in a superior court of criminal jurisdiction, for misbehaviour in office. *The Commonwealth* v. *Alexander*, 522
5. In such case, the jury's finding the defendant "*guilty*," is sufficient to authorize the judgment of amotion from office; but no further testimony is admissible before the court, after the jury has been discharged, *ib.*

COSTS.

1. Under what circumstances relief will be granted in equity, but at the costs of the complainant. *Mosby* v. *Haskins et al.* 427
2. In what cases trustees, executors or administrators, shall pay costs out of their own estates. *Sorrel* v. *Proctor*, 431
3. If a party have an account taken as to a subject before decided by the court in the same cause, so much of the report will be at his own costs. *Corbin* v. *Beverley and others*, 448
4. After special demurrer to a bill in chancery, the plaintiff may have leave to amend on payment of costs. *Rose* v. *King*, 475
5. A plaintiff in a superior court of chancery, not being an inhabitant of this commonwealth, may be ruled to give security for the costs in that court; but not for costs incurred in the court of appeals from which the suit was remanded for farther proceedings. *Lambert* v. *Key*, 484
6. A defendant after an order for an account, may move to set it aside, and file his answer, on paying the costs which may have accrued before the commissioners. *Lindsay* v. *Campbell & Wheeler and others.* 505

COVENANT.

1. In declaring on a covenant, it is sufficient to set out the substance and legal effect only of such parts of the deed as are necessary to entitle the plaintiff to recover; and in assigning a breach, it is not necessary to do it in the very words of the covenant; the intention of the parties to be collected from the instrument may alone be stated. If, therefore, the declaration charge a covenant to sell to the plaintiff a certain quantity of land, and to refund all moneys paid therefor, in case the land or any part be lost, it is a sufficient assignment of the breach that "the defendant had no land at all" in the place specified. *Busters Ex'r* v. *Wallace*, 82
2. But even if a breach be badly assigned, it will be aided after a verdict for the plaintiff on an issue joined, on the plea that the defendant had not broken the covenant, *ib.*
3. See AGREEMENT, No. 1.

CREDITORS.

1. Executors and administrators ought to be allowed in their accounts, all reasonable charges and disbursements for the benefit of the estate they represent, and a reasonable recompense for their personal trouble, in preference to the claim of any creditor of the decedent. *Nimmo's Ex'r* v. *The Commonwealth*, 57
2. What are such reasonable charges and disbursements, *ib.*

See EXECUTORS and ADMINISTRATORS, No. 3.

3. The proceeds of the sale of land directed by the will of a testator to be sold for the payment of his debts, are equitable assets, and should be distri-

buted among all the creditors *pari passu*; nor are such assets proper subjects for the cognisance of a court of law. *Nimmo's Ex'r* v. *The Commonwealth*, 57

4. Under what circumstances the creditors of a father are not entitled to disturb the possession of a slave by his infant child who is deemed a purchaser for a valuable consideration. *Braxton* v. *Gaines and others*, 151

See PURCHASER, No. 3.

5. A simple contract creditor shall receive, out of the real assets descended to the heirs at law, as much as has been paid to bond creditors out of the personal assets. *Haydon* v. *Goode et al.* 460

6. A creditor admitted a party plaintiff, for the purpose of obtaining a proportion of an equitable fund, may, on filing his bill, at once prove his claim before a commissioner, (to whom the subject generally has been referred,) without waiting until the cause, as to him, shall have been set for hearing in the usual course of the court. *Anderson* v. *Anderson and others*, 475

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8. A home defendant, decreed to pay money to a creditor of an absent defendant, will be compelled to pay interest, unless he make a legal tender, or bring the money into court, *Ross* v. *Austin*, 502

COURSE AND DISTANCE.

1. Natural or reputed boundaries, or lines of marked trees ought to be established in preference to mere course and distance, or to mistaken descriptions in surveys or conveyances. *Dogan* v. *Seekright, Lessee of Carter*, 125

2. See BOUNDARIES, No. 2. *ib.*

D

DAMAGES.

1. If the jury in a mill case, find that a certain number of acres of land will be overflowed "together with all other damages to the value of a specified sum," it is special enough, and will not bar an action for any damages not foreseen and estimated by them. *Coleman* v. *Moody*, 2

2. An order of court granting leave to erect a mill is valid, though no order be made directing payment of the damages found by the inquisition, *ib.*

DEBT.

1. In debt on bond with collateral condition, an assignment of a breach commencing "and whereas," &c. and continuing by way of recital to the end, without any direct averment, is insufficient, and such error is fatal on general demurrer. *Syme* v. *Griffin*, 277

2. In debt on bond given by distributees to indemnify an administrator for dividing the estate among them; the condition being "that they should pay him their respective proportions of all debts which he should be compelled to pay, that should thereafter come against said estate," it is a sufficient assignment of a breach to say, "that the plaintiff on a day subsequently to the date of the bond, had paid by the consent of the defendants, a debt which was then due from the estate aforesaid, and which as administrator he was bound to pay, and that the defendants had not paid him their respective parts," &c. *Moss and others* v. *Moss's Adm'r*, 293

DECEPTION.

A partner having withdrawn from a mercantile company, and being afterwards erroneously included in a suit against a new company formed by the other partners may be relieved in equity against a judgment obtained in such suit; on the ground that one of the company prevented his making defence at law, by assuring him that the matter should be adjusted. *Lee* v. *Baird et al.* 453

DECLARATION.

1. In declaring on a covenant, it is suffi-

cient to set out the substance and legal effect only of such parts of the deed as are necessary to entitle the plaintiff to recover; and, in assigning a breach, it is not necessary to do it in the very words of the covenant; the intention of the parties to be collected from the instrument may alone be stated. If, therefore, the declaration charge a covenant to sell to the plaintiff a certain quantity of land, and to refund all moneys paid therefor, in case the land or any part be lost, it is a sufficient assignment of the breach that "the defendant had no land at all" in the place specified. *Buster's Ex'r* v. *Wallace*, 82

2. But even if a breach be badly assigned, it will be aided after a verdict for the plaintiff on an issue joined, on the plea that the defendant had not broken the covenant, *ib.*

3. If a cause be remanded to an inferior court, and a new trial directed, the superior court must be presumed to have thought the declaration sufficient; consequently, on the new trial, or on a second appeal, no exception can be taken to the declaration. *Murdock, &c.* v. *Herndon's Ex'rs*, 200

4. It is settled under our act of assembly (1 *Rev. Code*, c. 66. s. 40. p. 80.) that a plea and demurrer at the same time to the whole declaration are admissible. *Syme* v. *Griffin*, 277

DECREE.

1. It is not necessary to state in a decree in chancery, that all the preliminary steps towards maturing the cause for hearing were taken, it being intended where the cause is set for hearing, that it was regularly done, unless the party intending to impugn the decree shew the contrary. *Quarrier* v. *Carter's Representatives*, 242

2. In a decree against infants, time should be given them to make objections, after attaining their full age. *Braxton* v. *Lee's Heirs*, 376

See also *Wilkinson's Adm'r* v. *Oliver's Representatives*, 450

3. An interlocutory decree being offered in the court of appeals, does not change its terms, but it remains to be executed in the court of chancery, in the same manner as before the appeal. *Wilson* v. *Triplett*, 433

4. A decree of a preceding term against a defendant who was then dead set aside on motion. *Hove* v. *Barber et al.* 439

5. Proceedings on decrees *nisi*. *Watts's Ex'rs* v. *Robertson*, 442

6. How decrees on foreign attachments should be entered, *ib.*

7. A motion for an account is irregular; it should be for a decree, which if the court cannot enter without an account it will direct one. *Hampton's Ex'rs* v. *Pollard*, 451

8. Where land has been sold under a decree to foreclose a mortgage, a jury will be directed to ascertain what proportion the value of the dower estate bore to that in remainder; and the sum found by the jury will be decreed to the tenant in dower. *Pollard et al.* v. *Underwood et al.* 459

9. On a bill taken as confessed, the plaintiff cannot obtain a final decree, without filing his documents, and proving his case. *Anonymous*, 476

10. After a decree for an account against a defendant who is in contempt, and a report of the commissioner, such defendant can be permitted to file his answer, on condition only that he do not delay the trial. *Fisher* v. *Fisher*, 484

11. The time allowed by a decree against an absent defendant, within which he might shew cause against it, having expired, the plaintiff is entitled to the benefit of the decree, without giving the security originally required by it. *Ross* v. *Austin*, 502

12. A home defendant decreed to pay money to a creditor of an absent defendant, will be compelled to pay interest, unless he make a legal tender or bring the money into court, *ib.*

13. How the performance for decrees of alimony is to be enforced, where the defendant stands out process of contempt. *Purcell* v. *Purcell*, 507

14. A defendant's being in contempt to the first process of the court is not a contempt to the decree, and forms no objection to his pleading to a *scire facias* brought to revive that decree. *Lane* v. *Ellzey*, 504

15. A defendant may plead to a *scire facias* brought to revive a decree, which was obtained against him by default, that the original contract was usurious, *ib.*

DEED.

1. How far parol or other evidence *dehors* the deed is admissible to shew that an estate conveyed to a wife was intended in lieu of dower, though not so expressed. See JOINTURE, No. 1. *Ambler and Wife* v. *Norton*, 23
2. See COVENANT, No. 1. *Buster's Ex'r* v. *Wallace*, 82
3. A vendor having conveyed a tract of land by an absolute deed of bargain and sale may, nevertheless, by virtue of a parol agreement coupled with continuing to reside on the land, reretain an equitable lien against a purchaser from the vendee having actual notice of such agreement. *Duval* v. *Bibb*, 113

See LIEN, No. 2.

4. In equity, either party to a deed may aver and prove against the other, or against a purchaser with notice, the true consideration on which it was founded, though a different consideration be mentioned therein. *Duval* v. *Bibb*, 113

See EQUITY, No. 5.

5. No particular form of words is necessary in the signature of a deed by an attorney in fact; provided the act be done in the name of his principal. It is therefore indifferent whether he sign it "B. W. attorney for R. C." or "R. C. by B. W. his attorney." *Jones's Devisees* v. *Carter*, 184
6. In what case a deed for land by two out of three executors is not valid in law, and cannot be aided in equity. *M'Rae* v. *Farrow*, 444
7. Where a sale of lands is directed by a court of equity, the deeds to purchasers are to be executed by the commissioners. *Wilkinson's Adm'r* v. *Oliver's Representatives*, 450
8. See INFANT, No. 3. *ib.*

DEFAULT.

A defendant may plead to a *scire facias* brought to revive a decree, which was obtained by default, that the original contract was usurious. *Lane* v. *Ellzey*, 504

DEFENDANT.

1. A court of equity, for the purpose of assisting process of execution levied on tobacco in a public warehouse, will award an injunction, directing the inspectors not to deliver the notes to the defendant. *Ogg* v. *Randolph and others*, 445
2. Practice of reviving suits against resident and non-resident defendants. *Duguid* v. *Patterson*, 445
3. A verdict at law against a party is no bar to a decree in his favour, if he be brought into chancery by the adverse party; otherwise, if he were plaintiff in equity. *Jones* v. *Jones*, 447
4. Practice as to bringing in the defendant, by a messenger, to answer interrogatories. *Brown, Rives & Co.* v. *Wilson*, 481
5. Practice in appointing guardians to defend infants. *Chapman* v. *Turberville*, 482
6. A commission to examine one of the defendants, as a witness, should be awarded, on the motion of the plaintiff, as a matter of course; saving all just exceptions. *Plainville* v. *Brown and others*, 482
7. A motion to be admitted as a defendant is not regular; but, in case of an injunction, if it appear that the person making the motion is interested in the subject of controversy, the court will order the injunction to be dissolved, unless the plaintiff will amend his bill, and make him a defendant. *Harrison* v. *Morton*, 483
8. After a bill of injunction has been taken for confessed, for want of an answer, a motion will not be received from the defendant to discharge it, as having been improvidently awarded. *Turpin, Adm'r of James*, v. *Jefferson*, 483
9. After a decree for an account against a defendant, who is in contempt, and a report of the commissioner, such defendant can be permitted to file his answer on condition only that he do not delay the trial. *Fisher* v. *Fisher*, 484
10. A commission cannot issue, at the instance of a defendant, to examine the plaintiff as a witness in the cause. *Ross* v. *Carter*, 488
11. The time allowed by a decree against an absent defendant, within which he might shew cause against it, having expired, the plaintiff is entitled to the benefit of the decree, without giving the security originally required by it. *Ross* v. *Austin*, 502
12. A home defendant, decreed to pay

money to a creditor of an absent defendant, will be compelled to pay interest, unless he make a legal tender, or bring the money into court. *Ross* v. *Austin*, 502

13. While a defendant is in contempt, no plea or demurrer can be admitted but upon motion in open court. *Lane* v. *Ellzey*, 504

14. A defendant's being in contempt to the first process of the court is not a contempt to the decree; and forms no objection to his pleading to a *scire facias* brought to revive that decree, *ib.*

15. A defendant may plead to a *scire facias* brought to revive a decree, which was obtained against him by default, that the original contract was usurious, *ib.*

16. A defendant, after an order for an account, may move to set it aside, and file his answer, on paying the costs which may have accrued before the commissioner. *Lindsay* v. *Campbell & Wheeler and others*, 505

17. How the performance of decrees for alimony is to be enforced, where the defendant stands out process of contempt. *Purcell* v. *Purcell*, 507

DELAY.

Quære, whether a *mandamus* lies from the superior courts of chancery to a county court, compelling the justices to hear and determine a cause, where there appears to have been unreasonable delay! *Webb* v. *Barbour*, 462

DELAY CASE.

Although a palpably frivolous bill of exceptions to the opinion of the court below is not sufficient to prevent the court of appeals from taking up a cause out of its turn on the docket, as a delay case; yet, if the point be in any degree doubtful, it will not be so taken up. *Fox* v. *Govan*, 156

DEMURRER.

1. In averring a jointure in bar of dower, the failure to state in the plea, that the husband "being seised in fee of the premises" made the jointure, is not a substantial defect, nor sufficient to authorize the reversal of a judgment for the tenant, the demandant having failed to assign it as a cause of demurrer. *Ambler and Wife* v. *Norton*, 253

2. It is settled under our act of assembly, (1 *Rev. Code*, p. 80. c. 66. s. 40.) that a plea and demurrer at the same time to the whole of the declaration, are admissible. *Syme* v. *Griffin*, 277

3. A general demurrer is an issuable plea, which ought to be received on setting aside an office judgment, *ib.*

4. In debt on bond with collateral condition, an assignment of a breach commencing "and whereas," &c. and continuing by way of recital to the end, without any direct averment, is insufficient; and such error is fatal on general demurrer, *ib.*

5. After special demurrer to a bill in chancery, the plaintiff may have leave to amend on payment of costs. *Rose* v. *King*, 475

6. Objections to a *scire facias* to revive should be by plea or demurrer, unless at the hearing the party do not entitle himself to revive. *Vaughan and Wife* v. *Wilson's Ex'r*, 480

7. While a defendant is in contempt, no plea or demurrer can be admitted, but upon motion in open court. *Lane* v. *Ellzey*, 504

DEPOSITIONS.

1. The reasonable notice which the law requires upon taking depositions must depend upon circumstances; therefore, where a notice was left with the wife of the party at his dwelling-house, when it was known by the adverse party that he was absent on a journey to another state, and where it appeared also, that the notice might previously have been given to the party himself, and that the taking of the deposition might have been postponed, as it respected the trial of the cause, till his return; it was held that the notice was insufficient, and the deposition taken under it was suppressed. *Coleman* v. *Moody*, 1, 2

2. If depositions offered as evidence in a court of law contain matter supposed to be exceptionable, the proper course is to point out the exceptionable passages, and then move the court to instruct the jury to disre-

gard such passages. *Buster's Ex'r v. Wallace*, 82
3. When exceptions to such as are taken after the cause is set for hearing may be made. *Foster* v. *Sutton*, 401
4. After a cause has been argued, a commission to take depositions cannot be obtained, but upon the affidavit of the party, and by special order of the court for that purpose. *Anonymous*, 409
5. A notice to take a deposition given to the overseer of the party, who resided part of his time in the state, and part out, is not sufficient. *Chapman* v. *Chapman*, 426
6. After publication of depositions, and the cause set down for hearing, the original bill cannot be amended by making new parties, or charging a new fact; but a supplemental bill may be offered. *Pleasants* v. *Logan*, 489

DESCENTS.

Construction of the act of descents, as to the mother's inheriting the estate from an infant child, on whom it descended from the great uncle of the infant. *Owen* v. *Cogbill and others*, 487

DESCRIPTION.

action of detinue may be maintained for an infant negro child, of such a mother, without any other description. *Bass* v. *Bass*, 478

DETINUE.

An executor having delivered certain slaves to legatees, as their property under the will, a subsequent action of detinue against him for other slaves which the testator held in the same right, is not sufficient, though prosecuted to a judgment, to prevent the act of limitations from running, both at law and in equity, in favour of the legatees. *Spotswood* v. *Dandridge and others*, 140
If the plaintiff obtain a judgment in detinue for slaves, and their profits, to the rendition of the judgment, he cannot come into equity for the profits which afterwards accrued pending an appeal; nor to recover their increase not included in such judgment; nor to compel the delivery of them by purchasers from the defendant. *Alderson* v. *Biggars and others*, 470
3. An action of detinue may be maintained for an infant negro child, of such a mother, without any other description. *Bass* v. *Bass*, 478

DEVISE.

See WILLS.

1. In construing a will, the whole must be taken together, and no particular clause or clauses selected. *Reno's Ex'rs* v. *Davis and Wife*, 288
2. The word increase (without the word future prefixed) in the bequest of a female slave, is ambiguous; and, if the intention of the testator in using it cannot be ascertained from the whole will taken together, parol evidence is admissible to explain it, *ib.*

DISBURSEMENTS.

1. How far a trustee allowed for he disbursements made by him without the consent of his co-trustees. *Miller* v. *Beverleys, &c.* 415
2. What evidence ought to be required by a commissioner as to certain items of disbursements, *ib.*

DISCOUNTS.

The plaintiff in replevin may avail himself of a set-off, on the same principle that a defendant may prove discounts in any other suit. *Nicolson & Heth* v. *Hancock and others*, 491

DISCOVERY.

A bill for discovery lies in cases only where the plaintiff's right cannot be established without the discovery sought for. It does not lie, therefore, to discover the name of a negro child whose mother is known, nor the profits of slaves; of which a jury are the best judges. *Bass* v. *Bass*, 478

DISCRETION.

A court has not an unlimited discretion

to grant or refuse a continuance of a cause; but a superior court will judge, on a bill of exceptions, whether it exercised a sound discretion or not. See CONTINUANCE, No. 1. *Hook* v. *Nanny and others*, *in a note*, 157

DISTRICT COURTS.

A writ returnable to a district court of common law, might legally be executed at any time during the term to which it was returnable. *Dunbar & Vass* v. *Long's Adm'r*, 212

DOCKET.

In chancery proceedings, when a plea is set down for argument, the cause must be put on the court docket. *Hill* v. *Green*, 448

DOWER.

1. Construction of the term averment in the act of assembly relating to dower; and how a jointure made by deed or will in lieu of dower should be pleaded and proved. *Ambler and Wife* v. *Norton*, 23
2. In averring a jointure in bar of dower, the failure to state in the plea, that the husband "being seised in fee of the premises" made the jointure, is not a substantial defect, nor sufficient to authorize the reversal of a judgment for the tenant, the demandant having failed to assign it as a cause of demurrer, *ib.*
3. In such plea it is not necessary to state expressly, that the jointure was to take effect in possession immediately on the death of the husband, or that it was determinable by such acts only as would forfeit the dower at common law, it being incumbent on the demandant (in replying) to shew that any intervening estate existed, or that the jointure was subject to any condition, other than the law imposes on a dowress. *ib.*
4. It is not essential to the validity of a jointure, that it should be exempt from any encumbrance by judgments, statutes, mortgages or bonds; the widow, if evicted of her jointure, having still a right to claim her dower, *ib.*
5. If personal property be bequeathed, as well as real estate devised to the widow, the whole of such bequests and devises being averred to be in lieu of dower, her entering on the real estate is sufficient to shew her election to take the jointure; and, in pleading, it is not necessary to state that she received the personal property also. *Ambler and Wife* v. *Norton*, 23
6. See VENUE, No. 1, *ib.*
7. If a bachelor, seised in fee of lands prior to the year 1760, contracted to sell them; received part, or the whole, of the purchase-money; delivered possession to the purchaser without making a deed; and, having afterwards married, died in 1797; *quære*, whether his widow (having had notice before the marriage, of the purchaser's possession) is entitled to dower of such lands. *Braxton* v. *Lee's Heirs*, 376
8. A jury directed to ascertain what proportion the value of a dower estate bore to that in remainder; (where the land had been sold under a decree to foreclose a mortgage;) and the sum found by the jury decreed to the tenant in dower. *Pollard et al.* v. *Underwood et al.* 459

DRUNKENNESS.

1. Being intoxicated with spirituous liquors, while in the discharge of his official duties, is a sufficient misbehaviour, for which a justice of the peace ought to be amerced and removed from office. *The Commonwealth* v. *Alexander*, 522
2. See MISBEHAVIOUR IN OFFICE, No. 3, *ib.*

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ELECTION.

1. A widow's entering on real estate devised, together with personal property, in lieu of her dower, is sufficient to shew her election to take the jointure. See PERSONAL PROPERTY, No. 1. *Ambler and Wife* v. *Norton*, 23
2. A person having a suit at law depending on an appeal, and bringing a bill for relief as to the same subject matter, will be compelled to make a

election in which court he will proceed. *Gibbs* v. *Perkinson*, 415

ENGLISH DECISIONS

Are regarded by the superior court of chancery for the *Richmond* district, for the sake of information merely, but not as authority. *Marks* v. *Morris*, 463

EQUITY.

1. The proceeds of the sale of land, directed by a will to be sold for the payment of the testator's debts, are equitable assets, and should be distributed among all the creditors *pari passu*; nor are such assets proper subjects for the cognisance of a court of law. *Nimmo's Ex'r* v. *The Commonwealth*, 57

2. Under the influence of the maxim "that he who hath done iniquity shall not have equity," a mortgagor, who attempts by absconding and removing the mortgaged property out of the state, may be deprived of his equity of redemption. See JUDGMENT, No. 4. *Dabney, &c.* v. *Green*, 101

3. A vendor's equitable lien may be defeated by the vendee's mortgaging the property, and the mortgagee's purchasing a release of the equity of redemption, without notice of such lien. So also, if the mortgagee purchase such release (even after notice from the vendor) in consideration of any just claim of his upon the mortgagor, originating before such notice. But after notice, the lien attaches so as not to be defeated by any consideration subsequently originating. See NOTICE, No. 3. *Duval* v. *Bibb*, 113

4. A vendor having conveyed a tract of land by an absolute deed of bargain and sale, may nevertheless retain an equitable lien (by virtue of a parol agreement that he should retain possession until the contract on the part of the vendee should be fully complied with) against a purchaser having actual notice of such agreement, *ib.*

See AGREEMENT, No. 2.

5. In equity, either party to a deed may aver and prove against the other, or against a purchaser with notice, the true consideration on which the deed was founded, though a different consideration be mentioned therein; but a *bona fide* purchaser, without notice of the existence of such consideration, is not to be affected thereby. *Duval* v. *Bibb*, 113

6. The vendee or his legal representatives, ought to be parties to a suit in chancery, brought by the vendor against a subsequent purchaser, to recover a balance alleged to be due from the vendee, *ib.*

7. The act of limitations runs in equity as well as at law in favour of legatees to whom an executor has delivered slaves as their property under the will, and is not prevented by a subsequent action of detinue against him for other slaves which his testator held in the same right. *Spotswood* v. *Dandridge and others*, 140

8. It is no ground for relieving in equity either the principal or the sureties in a forthcoming bond, that the principal was not the owner of the property specified therein, or had only a qualified interest. *Syme and others* v. *Montague*, 180

9. Under what circumstances relief will be afforded in equity, but at the costs of the complainant. *Mosby* v. *Haskins et al.* 427

10. A consignee of goods may dispose of them in the way of trade, but he cannot pawn them for his own benefit, so as to devest the property of the consignor. In this case, the facts being clear, the consignors (the plaintiffs) are not to be turned round to a court of law, but a decree may be entered in their favour at once against the pawnees. *Skinner & Co.* v. *Dodge & Cobb et al.* 432

11. Securities who had a lien on the property of their principal by mortgage, but which was defective, it being proved by two witnesses only, were allowed to stand in the place of the creditor as to the assets of the principal. *Miller, &c.* v. *Pendleton et al.* 436

12. A party who might have pleaded *non est factum* in an action at law, and who merely wrote to counsel to defend him, is guilty of such neglect as will preclude him from relief in equity. *Stanard* v. *Rogers*, 438

13. How to proceed in introducing *viva voce* evidence at the hearing of a suit in chancery. *Emerson* v. *Berkley and Stone*, 441

14. Practice as to executing attachments to compel an appearance. *Watts's Ex'rs* v. *Robertson*, 442
15. Proceedings on decrees *nisi*, *ib.*
16. How decrees on foreign attachments should be entered, *ib.*
17. In suits in equity to subject lands in the possession of heirs to the payment of debts, the constant course, where there is no specific lien, is first to take an account of the personal assets. *M'Loud* v. *Roberts and others*, 443
18. A conveyance of land by two out of three executors, all of whom qualified and were living, (the testator having directed the sale and conveyance by *his executors*, in general terms,) is not valid in law, and cannot be aided in equity. *M'Rae* v. *Farrow*, 444
19. The aid of a court of equity is necessary and proper in assisting process of execution levied on tobacco in public warehouses. *Ogg* v. *Randolph and others*, 445
20. Practice of reviving a suit in equity against resident and non-resident defendants. *Duguid* v. *Patterson*, 445
21. A commissioner's report under an order made when the representatives of a deceased party were not before the court will be set aside, *ib.*
22. A report shewing a balance due from a defendant, is not a sufficient ground for an order directing the money to be brought into court. The plaintiff should proceed to a decree which he may enforce by the usual process. *Campbell* v. *Braxton and others*, 446
23. Rule as to taking the account of a party as evidence against him. *Jones* v. *Jones*, 447
24. A verdict at law against a party is no bar to a decree in his favour, if he be brought into chancery by the adverse party: otherwise, if he were the plaintiff in equity, *ib.*
25. Where a plea is set down for argument, the cause must be put on the court docket. *Hill* v. *Green*, 448
26. If a party have an account taken as to a subject before decided by the court in the same cause, so much of the report will be at his own costs. *Corbin* v. *Beverley and others*, 448
27. A report made while a cause stood dismissed, and before it was reinstated, will be recommitted. *Williamson* v. *Childress*, 449
28. A mortgagee cannot be compelled, in order to get hold of the mortgaged subject, to go into an account of the personal assets. *Patton* v. *Page*, 449
29. Where an infant is decreed to do any act, he must have six months allowed him after he attains full age, to shew cause against the decree; but where lands are decreed to be sold for the payment of debts, there is no necessity unless he is directed to join in the conveyance, as the commissioners will execute the deed. *Wilkinson's Adm'r* v. *Oliver's Representatives*, 450
30. A partner having withdrawn from a mercantile company, and being afterwards erroneously included in a suit against a new company formed by the other partners, may be relieved in equity against a judgment therein obtained, upon the ground that one of the company prevented his making defence at law, by assuring him the matter should be adjusted. *Lee* v. *Baird et al.* 453
31. If a party prosecute his action at law, and there be a decision of an inferior court against him, from which he takes an appeal, but does not prosecute it, he cannot come into equity for relief, on the same subject matter. *Saunders* v. *Marshall et al.* 455
32. How far a judgment at law is a bar to a subsequent suit at law, or in equity, against the party in whose favour such judgment was rendered, *ib.*
33. The plaintiff being both heir and administrator, and seeking to be relieved as administrator, will not be entitled to such relief, unless he will do equity as heir. *Haydon* v. *Goode et al.* 460
34. In cases of usury, the borrower filing his bill in equity is entitled to relief, not against the contract entirely, but to the amount of all but the principal money; the lender being entitled to receive his principal without any interest. *Marks* v. *Morris*, 463
35. In such cases, though relief be given against the interest, the usurious assurances remain as a security for the principal; and the court will direct them to be enforced to that extent, if it be not paid by a given day, *ib.*
36. The proper line of demarcation between the jurisdictions of courts of law and equity. *Alderson* v. *Biggar and others*, 471
37. A plaintiff cannot come into equit

for profits of slaves accruing during the pendency of an appeal from a judgment in *detinue*, nor to recover their increase not included in such judgment, nor to compel the delivery of them by purchasers from the defendant. *Alderson* v. *Biggars and others*, 470

38. A court of equity ought not to interpose in the case of a nuisance, except where the law would not afford an immediate nor an adequate remedy, until irreparable injury might be done. *Wingfield* v. *Crenshaw*, 474

39. A creditor admitted a party plaintiff for the purpose of obtaining a proportion of an equitable fund, may, on filing his bill, at once prove his claim before a commissioner (to whom the subject generally has been referred) without waiting until the cause as to him shall have been set for hearing in the usual course of the court. *Anderson* v. *Anderson and others*, 475

40. After special demurrer to a bill, the plaintiff may have leave to amend on payment of costs. *Rose* v. *King*, 475

41. Practice where the plaintiff is proceeding in a superior court of chancery, and on the equity side of a county court for the same cause of action. *Johnston* v. *Bower and others*, 476

42. On a bill taken as confessed, the plaintiff cannot obtain a final decree without filing his documents and proving his case. *Anonymous*, 476

43. An answer filed by an infant may be amended, on motion, when he attains his age. *Winston* v. *Campbell*, 477

44. An order for an account is not to be made as of course, but upon a hearing only, unless the parties consent: and where it would be proper, it should not be directed in vacation, without notice to the adverse party, or his counsel. *Cutting and Wife* v. *Carter*, 478

45. A bill for discovery lies only in cases where the plaintiff's right cannot be established without the discovery sought for. It does not lie, therefore, to discover the name of a negro child whose mother is known, nor the profits of slaves, of which a jury are the best judges. *Bass* v. *Bass*, 478

46. A verdict obtained at law, on the testimony of a single witness, whose answer (when he is brought into equity on the ground of his being a partner) is clearly contradicted, should be set aside, and a new trial directed. *Verdier* v. *Hume & Hume*, 479

47. A party, on whom process to revive is served, is allowed one term from the return day of such process, to prepare for trial. *Minor* v. *Jones*, 480

48. A bill of revivor is unnecessary, where a mere revival of the suit is sought; a *scire facias* being sufficient. *Vaughan and Wife* v. *Wilson's Ex'r*, 480

49. Objections to a *scire facias* to revive a suit cannot be made on motion: it should be by plea or demurrer, or if at the hearing, the party do not entitle himself to revive, the suit may be dismissed, *ib.*

50. Where an injunction is awarded "until the coming in of the answer," it is of course at an end when the answer comes in; so that it is unnecessary for the defendant to move to dissolve, but the plaintiff may move to reinstate. *Beall* v. *Gibson*, 481

51. In such case, if the injunction be not reinstated, the bill is to be dismissed at the next term, under the act of assembly, unless cause be shewn against it, *ib.*

52. Practice as to bringing in the defendant, by a messenger, to answer interrogatories. *Brown, Rives & Co.* v. *Wilson*, 481

53. Practice in appointing guardians to defend infants. *Chapman* v. *Turberville*, 482

54. A commission to examine one of the defendants as a witness should be awarded on the motion of the plaintiff, as a matter of course; saving all just exceptions. *Plainville* v. *Brown and others*, 482

55. A motion to be admitted as a defendant is not regular; but, in case of an injunction, if it appear that the person making the motion is interested in the subject of controversy, the court will order the injunction to be dissolved, unless the plaintiff will amend his bill, and make him a defendant. *Harrison* v. *Morton*, 483

56. After a bill of injunction has been taken for confessed for want of an answer, a motion will not be received from the defendant to discharge it as having been improvidently awarded. *Turpin, Adm'r of James*, v. *Jefferson*, 483

57. A plaintiff, not being an inhabitant of

this commonwealth, may be ruled to give security for the costs in the court of chancery; but not for costs incurred in the court of appeals from which the suit was remanded for further proceedings. *Lambert* v. *Key*, 484

58. After a decree for an account against a defendant who is in contempt, and a report of a commissioner, such defendant can be permitted to file his answer on condition only that he do not delay the trial. *Fisher* v. *Fisher*, 484

59. A plea to the jurisdiction of a superior court of chancery, that a suit is depending in an inferior court for the same matter, is proper. *Johnston* v. *Bower and others*, 487

60. A commission cannot issue at the instance of a defendant to examine the plaintiff as a witness in the cause. *Ross* v. *Carter*, 488

61. After publication of depositions, and the cause set down for hearing, the original bill cannot be amended by making new parties, or charging a new fact; but a supplemental bill may be offered. *Pleasants* v. *Logan*, 489

62. The rule which gives executors or administrators a term, after process of revival returned, is for their benefit; they may therefore waive it, and try the cause. *Chew* v. *Hoe*, 489

63. In a suit in equity against executors, it is not regular to enter a decree to be levied of the goods of the testator, without an account. *M'Rae* v. *Bates*, 490

64. Unless the plaintiff can shew, from some peculiar circumstances not within his control, that he could not be relieved at law, he shall not be permitted to come into a court of equity. *Nicolson & Heth* v. *Hancock and others*, 491

65. The time allowed by a decree against an absent defendant, within which he might shew cause against it, having expired, the plaintiff is entitled to the benefit of the decree, without giving the security originally required by it. *Ross* v. *Austin*, 502

66. A home defendant, decreed to pay money to a creditor of an absent defendant, will be compelled to pay interest, unless he make a legal tender or bring the money into court, *ib.*

67. Though it is a matter of course for a remainder-man of personal chattels to file a bill against tenant for life, for an account and inventory of the property, yet the court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear some danger of its being wasted or put out of the way. *Mortimer* v. *Moffatt and Wife*, 503

68. While a defendant is in contempt, no plea or demurrer can be admitted, but upon motion in open court. *Lane* v. *Ellzey*, 504

69. A defendant's being in contempt to the first process of the court is not a contempt to the decree, and forms no objection to his pleading to a *scire facias* brought to revive that decree, *ib.*

70. A defendant may plead to a *scire facias* brought to revive a decree which was obtained against him by default, that the original contract was usurious, *ib.*

71. A defendant after an order for an account, may move to set it aside, and file his answer, on paying the costs which may have accrued before the commissioner. *Lindsay* v. *Campbell & Wheeler and others*, 505

72. A sheriff may file a bill of interpleader to settle the rights of property, taken in execution, to which there are conflicting claims; but an injunction will not be awarded to stay any suit against him, in case of his selling the property, because the law provides him an ample remedy. *Storrs* v. *Payne and others*, 506

73. A wife, being a lunatic, and put under the care of a committee by the county court, will be restored to her husband by a decree of the superior court of chancery, upon his giving bond and security according to law. *Coleman's case*, 506

74. The court of chancery has jurisdiction in cases of alimony. *Purcell* v. *Purcell*, 507

75. What evidence of marriage is deemed sufficient to entitle the wife to alimony, *ib.*

76. How the performance of decrees for alimony is to be enforced where the defendant stands out process of contempt, *ib.*

☞ ADDITIONAL RULES OF PRACTICE in the superior court of chancery for the *Richmond* district, 521

EQUITY OF REDEMPTION.

1. In what case a mortgagee, by obtaining a judgment at law, and purchasing the mortgaged property under execution thereupon, deprives the mortgagee of the right of redemption. See JUDGMENT, No. 4. *Dabney, &c.* v. *Green*, 101
2. A *bona fide* mortgagee of a tract of land, without notice of any equitable lien in the person of whom the mortgagor purchased, is well authorized to purchase of the mortgagor a release of the equity of redemption, (even after notice from such vendor,) in consideration of any just claim of his upon the mortgagor, originating before such notice. *Duval* v. *Bibb*, 113

See MORTGAGE, No. 3. VENDOR, No. 1.

ERROR.

1. It is error sufficient to reverse a judgment, if it appear by a bill of exceptions that the party was improperly ruled into a trial. See CONTINUANCE, No. 1. *Hook* v. *Nanny and others, in a note*, 157
2. If the chancellor dismiss the bill at the same time that he dissolves the injunction, it is error, unless the consent of the complainant to such dismission appear in the record. See INJUNCTION, No. 1. *Blow* v. *Taylor*, 159
3. An error committed by an inferior court in ruling a defendant at law into a trial in the absence of his witnesses, ought to be corrected by a superior court of common law, but not in chancery. *Syme and others* v. *Montague*, 180

See AFFIDAVIT, No. 1.

4. When a cause is brought up to a superior court upon a bill of exceptions, the court will inspect the whole record, and if there be any error, will reverse the judgment for such error, though they may be of opinion that the court below decided rightly on the particular point on which the exceptions were taken. *Murdock, &c.* v. *Herndon's Ex'rs*, 200
5. Where error in a declaration cannot be taken advantage of after a cause is remanded by a superior court, *ib.*

EVICTION.

Where a purchaser comes into a court of equity for relief against a judgment at law, on the ground of a defect in the vendor's title to part of the tract of land purchased, it is not enough for him to allege such defect or want of title, he must prove an actual eviction, or a superior title in some other person. *Yancey* v. *Lewis*, 390

EVIDENCE.

1. What is reasonable notice upon taking depositions. See DEPOSITIONS, No. 1. *Coleman* v. *Moody*, 1
2. Parol or other evidence *dehors* the deed or will, how far admissible to shew that an estate conveyed to a wife was intended in lieu of dower, though not so expressed. See JOINTURE, No. 1. *Ambler and Wife* v. *Norton*, 23
3. *It seems*, that charges appearing to be just and legal, in an *ex parte* settlement of an administration account by commissioners appointed by the court which granted the administration, and passed by such court, (the commissioners having reported that vouchers were produced to justify such charges,) are to be received, *prima facie*, as evidence in favour of the executor or administrator, and that the burden of proof lies on the party who would impugn them. *Nimmo's Ex'r* v. *The Commonwealth*, 57
4. If B. agree to sell W. so many acres of land lying on a certain creek, &c. without specifying any boundaries, but a particular tract be shewn to W. as the land embraced by the agreement, and they accordingly enter into a contract under hand and seal, parol evidence is admissible to shew that B. either had no land at all on that creek, &c. or not that particular tract which it was understood by the parties was comprehended in the agreement. *Buster's Ex'r* v. *Wallace*, 82
5. If depositions offered as evidence in a court of law contain matter supposed to be exceptionable, the proper course is to point out the exceptionable passages, and then move the court to instruct the jury to disregard such passages, *ib.*

6. See WILL, No. 5, 6, 7. *Marks and Wife* v. *Bryant and Wife*, 91
7. A testator's bequeathing (among other things) an article of property which does not belong to him, is, at most, only a circumstance from which to infer a state of mind unfavourable to the making of a testament; and ought not to prevail against positive testimony, shewing his competency to make a will at the time in question, *ib.*
8. Circumstances proving a bill of sale, though absolute on its face, to have been intended as a mortgage, may be gathered from other writings and acts of the parties. *Dabney and others* v. *Green*, 101
See MORTGAGE, No. 1.
9. An administration account settled by commissioners appointed by the court, in which the executor or administrator qualified, and certified "to have been returned to court, and, being examined, to have been allowed, and ordered to be recorded," is admissible on the plea of *fully administered*, as *prima facie* evidence of the several items therein, without producing also copies of the inventory and appraisement of the testator's or intestate's estate. But the adverse party may surcharge and falsify such account if he can. *Atwell's Adm'rs* v *Milton*, 253
See also, *Mountjoy* v. *Lowry*, 428
10. The act of 1792, (1 *Rev. Code*, p. 167. s. 56.) which makes it the duty of the court, in actions against executors or administrators on open accounts, to expunge such items as appear to have been due more than 5 years before the death of the testator or intestate, applies to accounts existing before the first of *October*, 1793, when that act took effect; (see 1 *Rev Code*, c. 150. p. 293.;) but it relates only to open accounts, and does not extend to settlements or assumptions; therefore, the plaintiff, to take his case out of the act, may give in evidence an *assumpsit* of the testator or intestate; within five years, to pay a stated balance. *Brooke's Adm'rs* v *Shelly*, 266
11. The word *increase* (without the word *future* prefixed) in the bequest of a female slave, is ambiguous; and, if the intention of the testator in using it cannot be ascertained from the whole will taken together, parol evidence is admissible to explain it. *Reno's Ex'rs* v. *Davis and Wife*, 288
12. In a settlement of accounts between copartners, the books of the copartnery are admissible evidence, and vouchers for every item need not be produced. *Brickhouse* v. *Hunter, Banks & Co.* 363
13. Affidavits filed in support of a bill (there being no proof of notice) ought not to be considered as testimony in the cause, unless it appear on the record that they were read, either by consent of parties or without opposition, when such opposition might have been made. *Braxton* v. *Lee's Heirs*, 376
14. What evidence ought to be required by a commissioner, as to certain items of disbursements. *Miller* v. *Beverleys, &c.* 415
15. A settlement of an executor's or administrator's account, under an *ex parte* order of court, *prima facie* evidence. *Mountjoy* v. *Lowry*, 428
16. How to proceed in introducing *viva voce* evidence at the hearing of a suit in chancery. *Emerson* v. *Berkley & Stone*, 441
17. Rule as to taking the account of a party as evidence against him. *Jones* v. *Jones*, 447
18. Objections for want of proof of any voucher, on which a commissioner founds an item in his account, must generally be made before the commissioner himself, in which case, if such proof be not supplied, it may be called for at the hearing; but in no other instance, unless for good cause shewn, and upon one month's previous notice. *Read's Ex'rs* v. *Winston et al.* 450
19. A verdict obtained at law, on the testimony of a single witness, whose answer (when he is brought into equity on the ground of his being a partner) is clearly contradicted, should be set aside, and a new trial directed. *Verdier* v. *Hume & Hume*, 479
20. A commission cannot issue at the instance of a defendant to examine the plaintiff as a witness in the cause. *Ross* v. *Carter*, 488
21. What evidence of marriage is deemed sufficient to entitle the wife to alimony. *Purcell* v. *Purcell*, 507
22. On an information against a justice of the peace for misbehaviour in office, the jury's finding the defendant

"guilty," is sufficient to authorize the judgment of amotion from office; but no farther testimony is admissible before the court, after the jury has been discharged. *The Commonwealth* v. *Alexander*, 522

EXCEPTIONS, BILL OF.

When a cause is brought up to a superior court upon a bill of exceptions, the court will inspect the whole record, and if there be any error will reverse the judgment for such error, though they may be of opinion that the court below decided rightly on the particular point on which the exceptions were taken. *Murdock, &c.* v. *Herndon's Ex'rs*, 200

EXECUTION.

1. No length of time can bar the commonwealth from execution on a judgment in its favour, nor even render it necessary to sue out a *scire facias* to entitle it to such execution. *Nimmo's Ex'r* v. *The Commonwealth*, 57
2. A Mortgagee, by obtaining a judgment at law for his debt, and purchasing the mortgaged property under execution thereupon, does not, in general, deprive the mortgagor of the right of redemption. See JUDGMENT, No. 4. *Dabney, &c.* v. *Green*, 101
3. If the clerk of an inferior court misconceive a judgment, and issue execution against any person not properly a party thereto, the remedy is not by *supersedeas*, or writ of error, but by motion to quash the execution; and if such motion be overruled, an appeal may be taken to the court of error, or application may be made for a writ of error, or *supersedeas*, to the order overruling such motion. *Moss* v. *Moss's Adm'r*, 293
4. An execution directed to the sheriff of ———, may be executed by the serjeant of a corporate town. *Purcell* v. *Richardson*, 404
5. The aid of a court of equity is necessary and proper in assisting process of execution levied on tobacco in public warehouses. *Ogg* v. *Randolph and others*, 445
6. A commissioner's report shewing a balance due from a defendant is not a sufficient ground for an order directing the money to be brought into court. The plaintiff should proceed to a decree which he may enforce by the usual process. *Campbell* v. *Braxton and others*, 446
7. A sheriff may file a bill of interpleader to settle the rights of property, taken in execution, to which there are conflicting claims; but an injunction will not be awarded to stay any suit against him, in case of his selling the property. *Storrs* v. *Payne and others*, 506
8. How the performance of decrees for alimony is to be enforced, where the defendant stands out process of contempt. *Purcell* v. *Purcell*, 507

EXECUTION OF PROCESS.

A writ returnable to a district court of common law might legally be executed at any time during the term to which it was returnable. *Dunbar & Vass* v. *Long's Adm'r*, 213

EXECUTORS AND ADMINISTRATORS.

1. An executor and trustee, by appearing and contesting, on its merits, a motion for leave to erect a mill, may be precluded from afterwards saying that he was not legally summoned as the tenant or proprietor of the land. *Coleman* v. *Moody*, 2

See MILLS, No. 1.

2. An executor must, at his peril, take notice of a judgment against his testator, in what court soever it may have been rendered; and, if he exhaust the assets by paying debts of inferior dignity, must satisfy such judgment *de bonis propriis*. *Nimmo's Ex'r* v. *The Commonwealth*, 57
3. Executors and administrators ought to be allowed, in their accounts, all reasonable charges and disbursements for the benefit of the estate they represent, and a reasonable recompense for their personal trouble, in preference to the claim of any creditor of the decedent. The commonwealth's taxes on the property of the decedent, the expense of recovering a runaway negro whose value is credited to the estate, money paid for the hire of a slave (hired by the executor or administrator) to make a crop on the land of the decedent under the care of the executor or administrator, the proceeds of such crop being cre-

dited to the estate, are reasonable charges and disbursements. *Nimmo's Ex'r* v. *The Commonwealth*, 57

4. See ASSETS, No. 2. *ib.*

5. *It seems*, that charges appearing to be just and legal, in an *ex parte* settlement of an administration account, by commissioners appointed by the court which granted the administration, and passed by such court, (the commissioners having reported that vouchers were produced to justify such charges,) are to be received, *prima facie*, as evidence in favour of the executor or administrator; and that the burden of proof lies on the party who would impugn them, *ib.*

6. An executor having delivered certain slaves to legatees, as their property under the will, a subsequent action of *detinue* against him, for other slaves which the testator held in the same right, is not sufficient, though prosecuted to a judgment, to prevent the act of limitations from running, both at law and in equity, in favour of the legatees. *Spotswood* v. *Dandridge and others*, 140

7. An administration account settled before commissioners appointed by the court, in which the executor or administrator qualified, and certified "to have been returned to court, and, being examined, to have been allowed and ordered to be recorded," is admissible on the plea of *fully administered*, as *prima facie* evidence of the several items therein, without producing also copies of the inventory and appraisement of the testator's or intestate's estate. But the adverse party may surcharge and falsify such account, if he can. *Atwell's Adm'rs* v. *Milton*, 253

8. The act of 1792, (1 *Rev. Code*, p. 167. s. 56.) which makes it the duty of the court, in actions against executors or administrators on open accounts, to expunge such items as appear to have been due more than 5 years before the death of the testator or intestate, applies to accounts existing before the 1st of *October*, 1793, when that act took effect; (see 1 *Rev. Code*, c. 150. p. 293.;) but it relates only to open accounts, and does not extend to settlements or assumptions; therefore, the plaintiff, to take his case out of the act, may give in evidence an *assumpsit* of the testator or intestate, within five years, to pay a stated balance. *Brooke's Adm'rs* v. *Shelly*, 266

9. If one of two co-executors direct an appeal, writ of error, or *supersedeas*, originally granted to them both, to be dismissed, the other may proceed without him, and since both are before the court, an order of severance may be made without a summons. *Reno's Ex'rs* v. *Davis and Wife*, 288

10. How far the settlement of an executor's or administrator's account, made under an *ex parte* order of court, is to be regarded as evidence of the truth of the statements therein contained. *Mountjoy* v. *Lowry*, 428

11. A purchase of land by an executor, which had been sold by him agreeably to the will of his testator, is valid, if it appear that his conduct in the sale was fair and correct. *M'Key, Ex'r of Fuqua*, v. *Young*, 430

12. In what cases trustees, executors or administrators, shall pay costs out of their own estates. *Sorrel* v. *Proctor*, 431

13. In suits to subject to the payment of debts, lands in the possession of heirs, the constant course where there is no specific lien, is first to take an account of the personal assets. *M'Lord* v. *Roberts and others*, 443

14. But a mortgagee cannot be compelled, in order to get hold of the mortgaged subject, to go into an account of the personal assets. *Patton* v. *Page*, 449

15. A conveyance of land by two out of three executors, all of whom qualified and were living, (the testator having directed the sale and conveyance by his executors, in general terms,) is not valid in law, and cannot be aided in equity. *M'Rae* v. *Farrow*, 444

16. A report, under an order made when the representatives of a deceased party were not before the court, will be set aside. *Duguid* v. *Patterson*, 445

17. Practice where the appellees took possession of the property belonging to the intestate of the appellant pending the suit. *Wright* v. *Wright et al.* 452

18. In a suit by husband and wife, for the recovery of personal property in her right, if the husband die, the right survives to her; and, on her death, the suit should not be revived in the

name of his administrator. *Vaughan et ux.* v. *Wilson*, 452

19. A simple contract creditor shall receive, out of the real assets descended to the heirs at law, as much as has been paid to bond creditors out of the personal assets. *Haydon* v. *Goode et al.* 460
20. The plaintiff being both heir and administrator, and seeking to be relieved as administrator, will not be entitled to such relief, unless he will do equity as heir, *ib.*
21. An injunction in favour of an executor or administrator, on the ground of a deficiency of assets, should not be perpetual; but only until assets shall come to his hands to satisfy the judgment, or any part thereof, reserving to the creditor liberty to shew such assets by a *scire facias* at law, *ib.*
22. The rule which gives executors or administrators a term after process of revival returned, is for their benefit; they may therefore waive it, and try the cause. *Chew* v. *Hoe*, 489
23. In a suit in equity against executors, it is not regular to enter a decree to be levied of the goods of the testator, without an account. *M'Rae* v. *Bates*, 490

EXPOSITION OF WORDS.

1. In construing a will, the whole must be taken together, and no particular clause or clauses selected. *Reno's Ex'rs* v. *Davis and Wife*, 288
2. The word *increase* (without the word *future* prefixed) in the bequest of a female slave, is ambiguous; and, if the intention of the testator in using it cannot be ascertained from the whole will taken together, parol evidence is admissible to explain it, *ib.*

F

FATHER AND CHILD.

An infant child being a purchaser, for valuable consideration, of a slave, the circumstance that such child resides in the family of its father, and there keeps the slave, over whom it exercises every act of ownership, will not entitle the creditors of the father to disturb the possession of the child, although the father had included the slave in a mortgage, to indemnify the mortgagees against certain securityships. *Braxton* v. *Gaines and others*, 151

FEES.

An heir is not bound for clerk's fees and taxes due from the ancestor. *Haydon* v. *Goode et al.* 460

FORBEARANCE.

It is not usury to sell bank stock at a very high price; since, to constitute usury, there must be a treaty for the loan or forbearance of money. *Skipwith* v. *Gibson and Jefferson*, 490

FORECLOSURE.

Where land has been sold under a decree to foreclose a mortgage, a jury will be directed to ascertain what proportion the value of the dower estate bore to that in remainder; and the sum found by the jury will be decreed to the tenant in dower. *Pollard et al.* v. *Underwood et al.* 459

FOREIGN ATTACHMENT.

How *subpœnas* on foreign attachments should be endorsed. *Smith* v. *Jenny et al.* 440

FORGERY.

A suggestion that the survey (on which a patent for land granted by a sister state was founded) was a forgery, is not sufficient to authorize the collaterally drawing in question the validity of such patent in the courts of any other of the *United States*. *Lassly* v. *Fontaine*, 146

FORTHCOMING BOND.

It is no ground for relieving in equity either the principal or the sureties in a forthcoming bond, that the principal was not the owner of the property specified therein, or had only a qualified interest. *Syme and others* v. *Montague*, 180

FRAUD.

A marriage settlement on a wife, with whom the husband had long lived in a state of fornication, and by whom he had several children, will be deemed not to have been on valuable consideration, but voluntary and fraudulent as to creditors. *Greenhow* v. *Coutts and others*, 485

G

GENERAL ASSEMBLY.

How far the general assembly has power from time to time, to annul or alter acts of incorporation. *Currie's Adm'rs* v. *Mutual Assurance Society*, 315

GRANT.

A patent for land, granted by a sister state, is one of those public acts to which every other state is bound to give full faith and credit, under the constitution of the *United States*; therefore, the validity of such patent cannot be collaterally drawn in question in the courts of any other state, on a suggestion that the survey on which it was founded was a forgery. *Lassly* v. *Fontaine*, 146

GUARDIAN.

Practice in appointing guardians to defend infants. *Chapman* v. *Turberville*, 482

H

HEARING.

1. How to proceed in introducing *viva voce* evidence at the hearing of a suit in chancery. *Emerson* v. *Berkley and Stone*, 441
2. After reviving a suit in chancery, if, at the hearing, the party do not entitle himself to revive, the suit may be dismissed. See PLEADING. *Vaughan and Wife* v. *Wilson's Ex'r*, 480

HEIRS.

1. In suits to subject to the payment of debts, lands in the possession of heirs, the constant course, where there is no specific lien, is first to take an account of the personal assets. *M'Loud* v. *Roberts and others*, 443
2. The heir of the mortgagor cannot compel the mortgagee to resort to the personal assets before he can get hold of the mortgaged subject. *Patton* v. *Page*, 449
3. Where lands are decreed to be sold for the payment of debts, it is, in general, not necessary to allow the infant heirs of the debtor any time after they attain their full age to shew cause against the decree; because no act is necessary to be done by them; the deeds to the purchasers being to be executed by the commissioners. *Wilkinson's Adm'r* v. *Oliver's Representatives*, 450
4. A simple contract creditor shall receive, out of the real assets descended to the heirs at law, as much as has been paid to bond creditors out of the personal assets. *Haydon* v. *Goode et al.* 460
5. The plaintiff being both heir and administrator, and seeking to be relieved as administrator, will not be entitled to such relief, unless he will do equity as heir, *ib.*
6. An heir is not bound for clerk's fees and taxes due from the ancestor, *ib.*

HIRE.

In what case money paid by an executor or administrator for hire of slaves is to be debited against the estate of a decedent in preference to the claim of any creditor. *Nimmo's Ex'r* v. *The Commonwealth*, 57

See EXECUTORS and ADMINISTRATORS, No. 3.

HUSBAND AND WIFE.

1. A suit brought by husband and wife, to recover a demand in right of the wife, abates by her death. *Archer* v. *Colley and Wife*, 419
2. In a suit by husband and wife, for the recovery of personal property in her right, if the husband dies, the right

survives to her; and on her death the suit should not be revived in the name of his administrator. *Vaughan et ux* v. *Wilson*, 452

3. A marriage settlement on a wife with whom the husband had long lived in a state of fornication, and by whom he had several children, will be deemed not to have been on valuable consideration, but voluntary and fraudulent as to creditors. *Greenhow* v. *Coutts and others*, 485

4. A wife, being a lunatic, and put under the care of a committee by the county court, will be restored to her husband by a decree of the superior court of chancery, upon his giving bond and security according to law. *Coleman's case*, 506

5. The court of chancery has jurisdiction in cases of alimony. *Purcell* v. *Purcell*, 507

6. What evidence of marriage is deemed sufficient to entitle the wife to alimony, *ib.*

7. How the performance of decrees for alimony is to be enforced, where the defendant stands out process of contempt, *ib.*

I

INCUMBRANCE.

It is not essential to the validity of a jointure, that it should be exempt from any incumbrance, by judgments, statutes, mortgages or bonds; the widow, if evicted of her jointure, having still a right to claim her dower. *Ambler and Wife* v. *Norton*, 23

INCREASE.

1. The word "increase" (without the word "future" prefixed) in the bequest of a female slave, is ambiguous; and, if the intention of the testator in using it cannot be ascertained from the whole will taken together, parol evidence is admissible to explain it. *Reno's Ex'rs* v. *Davis and Wife*, 288

2. Of slaves, not included in a judgment in detinue cannot be recovered by a suit in equity. *Alderson* v. *Biggars and others*, 470

INFANT.

1. Where an infant child is deemed a purchaser, for valuable consideration, of a slave, the circumstance that such child resides in the family of its father, and there keeps the slave, over whom it exercises every act of ownership, will not entitle the creditors of the father to disturb the possession of the child, although the father had included the slave in a mortgage, to indemnify the mortgagees against certain securityships. *Braxton* v. *Gaines and others*, 151

2. In a decree against infants, time should be given them to make objections, after attaining their full age. *Braxton* v. *Lee's Heirs*, 376

3. Where an infant is decreed to do any act, he must have six months allowed him, after he attains full age, to shew cause against the decree, but where lands are decreed to be sold for the payment of debts, there is no necessity, unless he is directed to join in the conveyance, as the commissioners will execute the deed. *Wilkinson's Adm'r* v. *Oliver's Representatives*, 450

4. An answer in chancery filed by an infant may be amended, on motion, when he attains his age. *Winston* v. *Campbell*, 477

5. Practice in appointing guardians to defend infants. *Chapman* v. *Turberville*, 482

6. Construction of the act of descents, as to the mother's inheriting the estate from an infant child, on whom it descended from the great uncle of the infant. *Owen* v. *Cogbill and others*, 487

INFORMATION.

A justice of the peace may be amerced and removed from office upon an information against him in a superior court of criminal jurisdiction, for misbehaviour in office. *The Commonwealth* v. *Alexander*, 522

INHERITANCE.

Construction of the act of descents, as to the mother's inheriting the estate from an infant child, on whom it descended from the great uncle of the infant. *Owen* v. *Cogbill and others*, 487

INJUNCTION.

1. On the dissolution of an injunction, the complainant has a right to continue his cause as an original suit. If, therefore, the chancellor, without his consent, dismiss the bill at the same time that he dissolves the injunction, it is error. *Blow, Adm'r of Kello*, v. *Taylor and another, Ex'rs of Williams*, 159
2. The superior courts of chancery have power (upon general principles of equity) to direct the venue to be changed after issue joined in a county, or other inferior court, where it appears that strong prejudices existed against the defendant, which were unknown to him until after such issue was joined, and that a fair and impartial trial could not be expected in the court where the suit was depending. *Darmsdatt* v. *Wolfe*, 246
3. In such case, it is not necessary that there should have been a judgment, to authorize the chancellor to grant the injunction, *ib.*
4. In a bill for an injunction, where relief might have been had at law, the plaintiff must state why he did not defend himself at law. *Yancy* v. *Fenwick*, 423
5. Injunction to stay waste denied, there appearing no impediment to the action of waste at law. *Cutting* v. *Carter et al.* 424
6. Rules in granting injunctions. Under what circumstances relief will be granted, but at the costs of the complainant. *Mosby* v. *Haskins et al.* 427
7. A party who might have pleaded *non est factum* in an action at law, and who merely wrote to counsel to defend him, is guilty of such neglect as will preclude him from relief in equity. *Stanard* v. *Rogers*, 438
8. A court of equity, for the purpose of assisting process of execution levied on tobacco in a public warehouse, will award an injunction directing the inspectors not to deliver the notes to the defendant. *Ogg* v. *Randolph and others*, 445
9. An injunction in favour of an executor or administrator, on the ground of a deficiency of assets, should not be perpetual; but only until assets shall come to his hands to satisfy the judgment or any part thereof; reserving to the creditor liberty to shew such assets by a *scire facias* at law. *Haydon* v. *Goode et al.* 460
10. Where an injunction is awarded "until the coming in of the answer," it is, of course, at an end when the answer comes in; so that it is unnecessary for the defendant to move to dissolve; but the plaintiff may move to reinstate. *Beall* v. *Gibson*, 481
11. In such case, if the injunction be not reinstated, the bill is to be dismissed under the act of assembly, unless cause be shewn against it at the ensuing term after the coming in of the answer, *ib.*
12. A motion to be admitted as a defendant is not regular: but, in case of an injunction, if it appear that the person making the motion is interested in the subject of controversy, the court will order the injunction to be dissolved, unless the plaintiff will amend his bill, and make him a defendant. *Harrison* v. *Morton*, 483
13. After a bill of injunction has been taken for confessed, for want of an answer, a motion will not be received from the defendant to discharge it as having been improvidently awarded. *Turpin, Adm'r of James*, v. *Jefferson*, 483
14. An injunction will not be awarded to stay a suit against a sheriff for selling property taken in execution; because the law provides him an ample remedy. *Storrs* v. *Payne and others*, 505

INQUISITION.

1. An inquisition in a mill case ought not to be set aside on the ground that the jurors, before they were sworn, and afterwards, when their verdict had been agreed upon, but before they had signed it, ate and drank moderately at the expense of the applicant; no corruption appear-

ing, and the opposite party having consented. *Coleman* v. *Moody*, 2

2. It is sufficient for the clerk to state in the record that the writ of *ad quod damnum*, with the inquisition annexed, was returned by the sheriff, without inserting a copy of the signature of the sheriff, or of his deputy, to the return; a copy of the inquisition itself with the signatures of the jurors being inserted in the record, *ib.*

INSOLVENCY.

The assignee of a bond or note is not bound, if the maker be notoriously insolvent, to sue him before he can resort to the assignor. *Saunders* v. *Marshall et al.* 455

INSTRUCTIONS.

1. A court is not bound to give instructions on general and abstract propositions; but only on the actual case before them. *Buster's Ex'r* v. *Wallace*, 82
2. If depositions offered as evidence in a court of law contain matter supposed to be exceptionable, the proper course is to point out the exceptionable passages, and then move the court to instruct the jury to disregard such passages, *ib.*
3. See BOUNDARIES, No. 2. *Dogan* v. *Seekright, Lessee of Carter*, 125

INTENDMENT.

After verdict for the plaintiff on the plea of *nil debet*, it is no ground for arresting judgment, that the claim, as shewn by the declaration, was barred by the act of limitations; for it will be intended that, if the act were given in evidence, the plaintiff rebutted it by some other evidence, which avoided its operation. *Murdock, &c.* v. *Herndon's Ex'rs*, 200

INTENTION.

1. Under the 11th section of the act of assembly relating to dower, any estate conveyed by deed or will for a wife's jointure, in lieu of dower, though not so expressed, may be averred to have been so intended, and parol or other evidence, *dehors* the deed or will, is admissible, as to the relative situation of the parties, and circumstances of the testator, from which such intention may be inferred. *bler and Wife* v. *Norton*, 23
2. In assigning a breach of covenant, it is not necessary to do it in the very words of the covenant; the intention of the parties to be collected from the instrument may alone be stated. *Buster's Ex'r* v. *Wallace*, 82

See COVENANT, No. 1

INTEREST.

1. Under what circumstances the garnishee in a foreign attachment, will be compelled to pay interest during the existence of the restraining order. See ASSIGNMENT, ATTACHMENT, and *Tazewell's Ex'r* v. *Barrett & Co.* 259
2. In what cases trustees are liable to pay interest on the trust money retained in their hands; and how they may discharge themselves from such liability. *Miller* v. *Beverleys, &c.* 415
3. What is the proper mode of calculating interest where partial payments have been made. *Lightfoot* v. *Price*, 431
4. Interest on a *British* debt, during the war, disallowed in the court of chancery, after an affirmance of an interlocutory decree, by the court of appeals, in which no notice was taken of war interest. *Wilson* v. *Triplett*, 433
5. In cases of usury, the borrower filing his bill in equity is entitled to relief, not against the contract entirely, but to the amount of all but the principal money; the lender being entitled to receive his principal without any interest. *Marks* v. *Morris*, 463
6. In such cases, though relief be given against the interest, the usurious assurances remain as a security for the principal, *ib.*
7. A home defendant, decreed to pay money to a creditor of an absent defendant, will be compelled to pay interest, unless he make a legal tender, or bring the money into court. *Ross* v. *Austin*, 502

INTERLOCUTORY DECREES.

An interlocutory decree being affirmed by the court of appeals does not change its terms; but it remains to be executed here in the same manner as it did before the appeal; therefore, in this case, the appeal being affirmed without a deduction of war interest on a *British* debt, such deduction will be made in the court of chancery, especially as the plaintiff is asking the aid of that court to carry the decree into effect. *Wilson* v. *Triplett*, 433

INTERPLEADER.

A sheriff may file a bill of interpleader to settle the rights of property, taken in execution, to which there are conflicting claims; but an injunction will not be awarded to stay any suit against him, in case he sells the property. *Storrs* v. *Payne and others*, 506

INTERROGATORIES.

Practice as to bringing in the defendant by a messenger, to answer interrogatories. *Brown, Rives & Co.* v. *Wilson*, 481

INVENTORY.

1. Where an administration account settled before commissioners may be admitted as *prima facie* evidence, without exhibiting also a copy of the inventory and appraisement. See *Atwell's Adm'rs* v. *Milton*, 253
2. It is a matter of course for a remainderman of personal chattels to file a bill against tenant for life, for an account and inventory of the property. *Mortimer* v. *Moffatt and Wife*, 503

ISSUE OUT OF CHANCERY.

A jury directed to ascertain what proportion the value of a dower estate bore to that in remainder; (where the land had been sold under a decree to foreclose a mortgage;) and the sum found by the jury decreed to the tenant in dower. *Pollard et al.* v. *Underwood et al.* 459

JEOFAILS.

A defective assignment of a breach of covenant will be aided by a verdict for the plaintiff on an issue joined, on the plea that the covenant was not broken. *Buster's Ex'r* v. *Wallace*, 82

JOINT COVENANT.

In an action against the representatives of a person deceased, on a joint covenant entered into before the act "concerning partitions and joint rights and obligations," if it appear from the declaration that one of the joint covenantors survived, it is a radical defect, and not cured by verdict. *Atwell's Adm'rs* v. *Milton*, 253

JOINT-TENANTS.

Where two joint-tenants, of full age, and labouring under no legal disability, make partition of a tract of land by deed according to an old survey, (both being equally ignorant of its accuracy, and no fraud or misrepresentation appearing,) such divisions, however unequal, is binding on them and their assigns. *Jones's Devisees* v. *Carter*, 184

JOINTURE.

1. Under the 11th section of the act of assembly relating to dower, any estate conveyed by deed or will for a wife's jointure, in lieu of dower, though not so expressed, may be averred to have been so intended, and parol or other evidence, *dehors* the deed or will, is admissible, as to the relative situation of the parties, and circumstances of the testator, from which such intention may be inferred. *Ambler and Wife* v. *Norton*, 23
2. In averring a jointure in bar of dower, the failure to state in the plea, that the husband "being seised in fee of the premises" made the jointure, is not a substantial defect, nor sufficient to authorize the reversal of a judgment for the tenant, the demandant having failed to assign it as a cause of demurrer, *ib*

3. In such plea it is not necessary to state expressly, that the jointure was to take effect in possession immediately on the death of the husband, or that it was determinable by such acts only as would forfeit the dower at common law, it being incumbent on the demandant (in replying) to shew that any intervening estate existed, or that the jointure was subject to any condition, other than the law imposes on a dowress. *Ambler and Wife* v. *Norton*, 23
4. It is not essential to the validity of a jointure, that it should be exempt from any encumbrance by judgments, statutes, mortgages or bonds; the widow, if evicted of her jointure, having still a right to claim her dower, *ib.*
5. If personal property be bequeathed, as well as real estate devised to the widow, the whole of such bequests and devises being averred to be in lieu of dower, her entering on the real estate is sufficient to shew her election to take the jointure; and, in pleading, it is not necessary to state that she received the personal property also, *ib.*
6. See VENUE, No. 1. *ib.*

JUDGMENT.

1. On a writ of dower, a judgment for the tenant, who pleaded a jointure in bar, ought not to be reversed on the ground of his having failed to state in his plea that the husband "being seised in fee of the premises," made the jointure; the demandant not having assigned it as a cause of demurrer. *Ambler and Wife* v. *Norton*, 23
2. An executor must, at his peril, take notice of a judgment against his testator, in what court soever it may have been rendered; and if he exhaust the assets by paying debts of inferior dignity, must satisfy such judgment *de bonis propriis*. *Nimmo's Ex'r* v. *The Commonwealth*, 57
3. No length of time can bar the commonwealth from execution on a judgment in its favour, nor even render it necessary to sue out a *scire facias* to entitle it to such execution, *ib.*
4. A mortgagee, by obtaining a judgment at law for his debt, and purchasing the mortgaged property under execution thereupon, does not, in general, deprive the mortgagor of the right of redemption. But if such judgment and execution were upon an attachment against the mortgagor as an absconding debtor, attempting to defraud the mortgagee of his security by removing the property out of the state, he shall not be permitted to redeem, under the influence of the maxim, "that he who hath done iniquity shall not have equity." *Dabney and others* v. *Green*, 101
5. A judgment in detinue against an executor, for certain slaves, held by him as the property of his testator, is not sufficient to prevent the act of limitations from running in favour of legatees, to whom he delivered (before the action was brought) other slaves which the testator had held in the same right. *Spotswood* v. *Dandridge and others*, 140
6. A judgment may be reversed on the ground that a continuance of the cause should have been granted, instead of ruling the party to trial when unprepared. See CONTINUANCE, No. 1 *Hook* v. *Nanny and others, in a note*, 157
7. The court of appeals will direct their clerk to grant a certificate of their judgment, during term time, if it be absolutely necessary to attain the justice of the case. *Brown* v. *Crippin and Wise*, 173
8. In an action against several defendants, the *capias* being returned executed on part only, who appeared and defended the suit, and a discontinuance as to the rest having taken place by a failure to take out further process against them, a judgment against the *defendants* in general terms, must be understood as against those only who appeared; notwithstanding the declaration charged them *all* as "in custody," &c., and the caption of the entry of the judgment in the order book, mentioned the names of all. *Moss and others* v. *Moss's Adm'r*, 293
9. Where there was an action on a joint and several bond against six obligors, and the *capias* (which was against them all) was executed on two only, it was held that the plaintiff was not bound to sue out further process against the rest, but might take judgment against those two. In such case it seems indifferent whether

the declaration be against those two only, or against all named in the writ, provided the bond be properly described. *Moss and others* v. *Moss's Adm'r*, 293

10. Under what circumstances relief may be obtained in equity by a person formerly a partner, but who has withdrawn from a mercantile concern, against a judgment erroneously obtained against him as a member of a new company formed by the other partners. *Lee* v. *Baird et al.* 453
11. How far a judgment at law is a bar to a subsequent suit at law, or in equity, against the party in whose favour such judgment was rendered. *Saunders* v. *Marshall et al.* 455
12. After a judgment in *detinue* for slaves, the plaintiff cannot come into equity for profits accruing afterwards, pending an appeal; nor to recover their increase not included in such judgment; nor to compel the delivery of them by purchasers from the defendant. *Alderson* v. *Biggars and others*, 470
13. On an information against a justice of the peace for misbehaviour in office, the jury's finding the defendant "guilty," is sufficient to authorize the judgment of amotion from office. *The Commonwealth* v. *Alexander*, 522

JURISDICTION.

1. In what case and in what manner a circuit court of the *United States* may obtain jurisdiction of a suit originating in a state court. See STATE COURT, No. 1, 2. *Brown* v. *Crippin and Wise*, 173
2. An error committed by an inferior court, in ruling a defendant at law into a trial in the absence of his witnesses, ought to be corrected by a superior court of common law, but not in chancery. See AFFIDAVIT, No. 1. *Syme and others* v. *Montague*, 180
3. See FORTHCOMING BOND, No. 1. *ib.*
4. See PATENT FOR LAND, No. 1. *Lasely* v. *Fontaine*, 146
5. The superior courts of chancery have power (upon general principles of equity) to direct the *venue* to be changed, after issue joined, in a county or other inferior court, where it appears that strong prejudices existed against the defendant, which were unknown to him till after such issue was joined, and that a fair and impartial trial could not be expected in the court where the suit was depending. *Darmsdatt* v. *Wolfe*, 246
6. In such cases, it is not necessary that there should have been a judgment to authorize the chancellor to grant the injunction, *ib.*
7. A bill against a defendant not an inhabitant of this country, and having no property therein, cannot be sustained. *Hopkirk* v. *Bridges*, 413
8. Injunction to stay waste denied, there appearing no impediment to the action of waste at law. *Cutting* v. *Carter et al.* 424
9. A court of equity has jurisdiction to assist process of execution levied on tobacco in public warehouses. *Ogg* v. *Randolph and others*, 445
10. The proper line of demarcation between the jurisdictions of courts of law and equity. *Alderson* v. *Biggars and others*, 470

    See EQUITY, No. 36. S. C.
11. In what case a court of equity should interpose in case of a nuisance. *Wingfield* v. *Crenshaw*, 474
12. A plea to the jurisdiction of a superior court of chancery, that a suit is depending in an inferior court, for the same matter, is proper. *Johnston* v. *Bower and others*, 476. 487
13. Unless the plaintiff can shew, from some peculiar circumstances not within his control, that he could not be relieved at law, he shall not be permitted to come into a court of equity. *Nicolson & Heth* v. *Hancock and others*, 491
14. A wife, being a lunatic, and put under the care of a committee by the county court, will be restored to her husband by a decree of the superior court of chancery, upon his giving bond and security according to law. *Coleman's case*, 506
15. The court of chancery has jurisdiction in cases of alimony. *Purcell* v. *Purcell*, 507
16. A justice of the peace may be amerced and removed from office, upon an information against him in a superior court of criminal jurisdiction for misbehaviour in office. *The Commonwealth* v. *Alexander*, 522

JURORS.

An inqusition in a mill case ought not to be set aside on the ground that the jurors before they were sworn, and afterwards, when their verdict had been agreed upon, but before they had signed it, ate and drank moderately at the expense of the applicant; no corruption appearing, and the opposite party having consented. *Coleman* v. *Moody*,

JURY.

1. A jury directed to ascertain what proportion the value of a dower estate bore to that in remainder; (where the land had been sold under a decree to foreclose a mortgage;) and the sum found by the jury decreed to the tenant in dower. *Pollard et al.* v. *Underwood et al.* 459
2. A suit in chancery ought not to be brought to recover the profits of slaves; of which a jury are the best judges. *Bass* v. *Bass*, 478
3. On an information against a justice of the peace for misbehaviour in office, the jury's finding the defendant "guilty" is sufficient to authorize the judgment of amotion from office; but no farther testimony is admissible before the court, after the jury has been discharged. *The Commonwealth* v. *Alexander*, 522

JUSTICES OF THE PEACE.

1. A justice of the peace may be amerced and removed from office, upon an information against him in a superior court of criminal jurisdiction for misbehaviour in office. *The Commonwealth* v. *Alexander*, 522
2. Being intoxicated with spirituous liquors, while in the discharge of his official duties, is a sufficient misbehaviour, for which a justice of the peace ought to be amerced and removed from office, *ib.*
3. In such case, the jury's finding the defendant "guilty" is sufficient to authorize the judgment of amotion from office; but no farther testimony is admissible before the court, after the jury has been discharged, *ib.*

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LANDS.

1. An inquisition on a writ of *ad quod damnum*, in a mill case, having found that lands of T. R. deceased would be overflowed, and a summons having issued to T. C. acting executor and trustee of the decedent, to shew cause why leave should not be given to erect the mill; and T. C. having appeared and contested the motion on its merits, he was precluded from afterwards saying that he was not legally summoned as the tenant or proprietor of the land. *Coleman* v. *Moody*, 2
2. In pleading a jointure in bar of dower, it is not necessary to specify the name of the county in which the jointure land lies; provided the locality and identity of the land be described with reasonable certainty. *Ambler and Wife* v. *Norton*, 23
3. Where the lands of a decedent are under the care of an executor or administrator and the crops credited to the estate, money paid for the hire of slaves (hired by the executor or administrator) to make such crops, should be debited as a reasonable charge. *Nimmo's Ex'r* v. *The Commonwealth*, 57
4. The proceeds of the sale of land, directed by the will of the testator to be sold for the payment of his debts, are equitable assets, *ib.*

See ASSETS, No. 2.

5. If the declaration charge a covenant to sell to the plaintiff a certain quantity of land, and to refund all moneys paid therefor, in case the land or any part be lost, it is a sufficient assignment of the breach that "the defendant had no land at all" in the place specified. *Buster's Ex'r* v. *Wallace*, 82

See COVENANT, No. 1.

6. If B. agree to sell W. so many acres of land lying on a certain creek, &c. without specifying any boundaries; but a particular tract be shewn to W. as the land embraced by the agreement; and they accordingly enter into a contract under hand and seal;

parol evidence is admissible to shew that B. either had no land at all on that creek, &c. or not that particular tract which it was understood by the parties was comprehended in the agreement. *Buster's Ex'r* v. *Wallace*, 82

7. Natural or reputed boundaries or lines, of marked trees ought to be established in preference to mere course and distance, or to mistaken descriptions in surveys or conveyances. *Dogan* v. *Seekright, Lessee of Carter*, 125

8. It seems to be matter of law, on which the court, if either party require it, should instruct the jury, that a marked line shall prevail over one which has never been marked, *ib.*

9. *Assumpsit* for use and occupation of lands lies at common law, on an express promise. See ASSUMPSIT, No 1. *Eppes* v. *Cole*, 161

10. *Quære*, as to an implied promise? *ib.*

11. A patent for land, granted by a sister state, is one of those public acts, to which every other state is bound to give full faith and credit, under the constitution of the *United States;* therefore the validity of such patent cannot be collaterally drawn in question, in the courts of any other state, on a suggestion that the survey on which it was founded was a forgery. *Lassly* v. *Fontaine*, 146

12. What description constitutes a purchase of lands by metes and bounds. See *Jones's Devisees* v. *Carter*, 184

13. A purchase of land by an executor, which had been sold by him agreeably to the will of his testator, is valid, if it appear that his conduct in the sale was fair and correct. *M'Key, Ex'r of Fuqua*, v. *Young*, 430

14. In suits to subject lands in the possession of heirs to the payment of debts, the constant course, where there is no specific lien, is first to take an account of the personal assets. *M'Loud* v. *Roberts and others*, 443

15. A conveyance of land by two out of three executors, all of whom qualified and were living, (the testator having directed the sale and conveyance by *his executors*, in general terms,) is not valid in law, and cannot be aided in equity; nor would the payment of the purchase-money, in such case, create any lien on the land. *M'Rae* v. *Farrow*, 444

16. A mortgagee of land cannot be compelled, in order to get hold of the mortgaged subject, to go into an account of the personal assets. *Patton* v. *Page*, 449

17. Where lands are decreed to be sold for the payment of debts, it is in general, not necessary to allow the infant heirs of the debtor any time after they attain their full age to shew cause against the decree, because no act is necessary to be done by them; the deeds to the purchasers being to be executed by the commissioners. *Wilkinson's Adm'r* v. *Oliver's Representatives*, 450

18. But where an infant is directed to join in a conveyance, or to do any other act, he must have six months allowed him after he attains his full age, to shew cause against the decree, *ib.*

19. A jury directed to ascertain what proportion the value of a dower estate bore to that in remainder: (where the land had been sold under a decree to foreclose a mortgage;) and the sum found by the jury decreed to the tenant in dower. *Pollard et al.* v. *Underwood et al.* 459

20. A simple contract creditor shall receive, out of the real assets descended to the heirs at law, as much as has been paid to bond creditors out of the personal assets. *Huydon* v. *Goode et al.* 460

LAW, POINT OF.

It seems to be matter of law, on which the court, if either party require it, should instruct the jury, that a marked line shall prevail over one which was never marked. *Dogan* v. *Seekright, Lessee of Carter*, 125

LEGACY.

Construction of a will. What words give a vested interest which will pass to the representatives of a deceased legatee, though he was not to enjoy the estate till the death of a particular tenant for life, and died before that event happened. *Taylor's Adm'x* v. *Taylor's Ex'rs*, 411

LEGATEES.

An executor having delivered certain slaves to legatees, as their property under the will, a subsequent action of *detinue* against him, for other slaves which the testator held in the same right, is not sufficient, though prosecuted to a judgment, to prevent the act of limitations from running, both at law and in equity, in favour of the legatees. *Spotswood* v. *Dandridge and others*, 140

LIEN.

1. A *bona fide* mortgagee of a tract of land, without notice of any equitable lien in the original vendor, (of whom the mortgagor purchased,) is well authorized to purchase of the mortgagor a release of the equity of redemption, (even after notice from the vendor,) in consideration of any just claim of his upon the mortgagor, originating before such notice; but after notice the lien attaches, for so much as he may have actually paid, or agreed to pay, for such release, over and above the claims for which the mortgage was taken, and which originated before the notice. *Duval* v. *Bibb*, 113

See VENDOR, No 1.

2. A vendor having conveyed a tract of land by an absolute deed of bargain and sale, in which, and by a receipt at the foot whereof he acknowledged that the consideration expressed was fully paid, having, nevertheless, taken the vendee's bonds for the amount thereof, and continued to live on the land, by virtue of a parol agreement, that he should retain possession until the contract on the part of the vendee should be fully complied with, retained an equitable lien on the land against a purchaser from the vendee having actual notice of such agreement, *ib.*

3. Securities who had a lien on the property of their principal by mortgage, but which was defective, it being proved by two witnesses only, were permitted to stand in the place of the creditor, as to the assets of the principal. *Miller, &c.* v. *Pendleton*, 436

4. In suits to subject to the payment of debts, lands in the possession of heirs, the constant course, where there is no specific lien, is first to take an account of the personal assets. *M'Loud* v. *Roberts and others*, 443

5. But the case is otherwise where there is a specific lien: for a mortgagee cannot be compelled, in order to get hold of the mortgaged subject, to go into an account of the personal assets. *Patton* v. *Page*, 449

6. The payment of purchase-money does not create any lien on the land, in a case where a testator having directed the sale and conveyance by his executors, in general terms, two out of three executors (all of whom qualified and were living) sold the land and made the conveyance. *M'Rae* v. *Farrow*, 446

LIFE, TENANT FOR.

Though it is a matter of course for a remainder-man of personal chattels to file a bill against tenant for life, for an account and inventory of the property, yet the court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear some danger of its being wasted or put out of the way. *Mortimer* v. *Moffatt and Wife*, 503

LIMITATIONS.

1. The *English* maxim, that "*nullum tempus occurrit regi*," has been adopted in *Virginia* in relation to the commonwealth; on which principle it has been held, that the acts of limitations do not extend to the commonwealth, in civil suits, not founded on any penal act expressly limiting the commencement of the action. *Nimmo's Ex'r* v. *The Commonwealth*, 57

2. No length of time can bar the commonwealth from execution on a judgment in its favour, nor even render it necessary to sue out a *scire facias* to entitle it to such execution, *ib.*

3. To prevent length of time from barring a claim, on the ground that the possession of the defendant was fiduciary, such possession must have been fiduciary as to the plaintiff, or those under whom he claims: its being fiduciary as to any other person

is not sufficient. *Spotswood* v. *Dandridge*, 139

4. An executor having delivered certain slaves to legatees, as their property under the will, a subsequent action of detinue against him for other slaves which the testator held in the same right, is not sufficient, though prosecuted to a judgment, to prevent the act of limitations from running both at law and in equity, in favour of the legatees, *ib.*

5. After verdict for the plaintiff on the plea of *nil debet*, it is no ground for arresting judgment, that the claim, as shewn by the declaration, was barred by the act of limitations; for it will be intended that if the act were given in evidence, the plaintiff rebutted it by some other evidence which avoided its operation. *Murdock, &c.* v. *Herndon's Ex'rs*, 200

6. When the *assumpsit* of the testator or intestate, within 5 years, in an action on an open account against the executor or administrator, may be given in evidence to take the case out of the act of 1792. See *Brooke's Adm'rs* v. *Shelly*, 266

LOAN.

1. To determine whether a conveyance, though absolute on its face, is to be considered a bill of sale, or a mortgage, the true question always is, whether a purchase of the property, or a loan of money, or forbearance of a debt were intended. *Dabney, &c.* v. *Green*, 101

See MORTGAGE, No. 1.

2. In cases of usury, the borrower filing his bill in equity is entitled to relief not against the contract entirely, but to the amount of all but the principal money; the lender being entitled to receive his principal, without any interest. *Marks* v. *Morris*, 463

3. In such cases, though relief be given against the interest, the usurious assurances remain as a security for the principal; and the court will direct them to be enforced to that extent, if it be not paid by a given day, *ib.*

4. It is not usury to sell bank stock at a very high price; since, to constitute usury, there must be a treaty for the loan or forbearance of money. *Skipwith* v. *Gibson and Jefferson*, 490

LUNATIC.

A wife, being a lunatic, and put under the care of a committee by the county court, will be restored to her husband by a decree of the superior court of chancery, upon his giving bond and security according to law. *Coleman's case*, 506

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MANDAMUS.

1. It is a matter of right in the defendant, who is a non-resident of a state, and is sued in a state court, to remove the cause to the circuit court of the *United States*, for such state, on complying with the terms prescribed by the act of congress; and if the inferior court refuse to allow the removal of the cause, it may be compelled by *mandamus* emanating from the superior court of the state, not from the circuit court of the *United States*. *Brown* v. *Crippin and Wise*, 173

2. *Quære*, whether a *mandamus* lies from the superior courts of chancery to the county courts, compelling the justices to hear and determine a cause where there appears to have been unreasonable delay? *Webb* v. *Barbour*, 462

MARKED LINES.

1. Lines of marked trees ought to be established in preference to mere course and distance, or to mistaken descriptions in surveys or conveyances. *Dogan* v. *Seekright, Lessee of Carter*, 125

2. It seems to be matter of law, on which the court, if either party require it, should instruct the jury, that a marked line shall prevail over one which was never marked, *ib.*

MARRIAGE.

What evidence of marriage is deemed sufficient to entitle the wife to alimony. *Purcell* v. *Purcell*, 507

MARRIAGE SETTLEMENT.

A marriage settlement on a wife with whom the husband had long lived in a state of fornication, and by whom he had several children, will be deemed not to have been on valuable consideration, but voluntary and fraudulent as to creditors. *Greenhow* v. *Coutts and others*, 485

MARSHALLING ASSETS.

A simple contract creditor shall receive, out of the real assets descended to the heirs at law, as much as has been paid to bond creditors out of the personal assets. *Haydon* v. *Goode et al.* 469

MAXIMS.

1. The *English* maxim that "*nullum tempus occurrit regi*," has been adopted in *Virginia*, in relation to the commonwealth. See LIMITATIONS, No. 1. *Nimmo's Ex'r* v. *The Commonwealth*, 57
2. Under the influence of the maxim "that he who hath done iniquity shall not have equity," a mortgagor, may lose his equity of redemption, by attempting to abscond and remove the property out of the state, for the purpose of defrauding the mortgagee of his security. See JUDGMENT, No. 4. *Dabney and others* v. *Green*, 101
3. Application of the maxim that "he who seeks equity must do equity" to the case of a plaintiff being both heir and administrator. *Haydon* v. *Goode et al.* 460

MESSENGER.

Practice, as to bringing in the defendant, by a messenger, to answer interrogatories. *Brown, Rives & Co.* v. *Wilson*, 481

METES AND BOUNDS,

What shall constitute a purchase by. See *Jones's Devisees* v. *Carter*, 184

MILLS.

1. An inquisition on a writ of *ad quod damnum*, in a mill case, having found that lands of T. R. deceased, would be overflowed, and a summons having issued to T. C. acting executor and trustee of the decedent, to shew cause why leave should not be given to erect the mill; and T. C. having appeared and contested the motion on its merits, he was precluded from afterwards saying that he was not legally summoned as the tenant or proprietor of the land. *Coleman* v. *Moody*, 2
2. The mentioning in the writ of *ad quod damnum* a certain height for the mill dam, is no ground for setting aside the proceedings at the instance of the opposing party; notwithstanding no particular height was specified in the order directing the writ, *ib.*
3. If the jury find that a certain number of acres of land will be overflowed "together with all other damages to the value of a specified sum," it is special enough, and will not bar an action for any damages not foreseen and estimated by them, *ib.*
4. An order of court granting leave to erect a mill is valid, though no order be made directing payment of the damages found by the inquisition, *ib.*
5. An inquisition in a mill case ought not to be set aside on the ground that the jurors, before they were sworn, and afterwards, when their verdict had been agreed upon, but before they had signed it, ate and drank moderately at the expense of the applicant; no corruption appearing, and the opposite party having consented, *ib.*
6. What is a sufficient setting forth in the record of the return of the writ of *ad quod damnum*, *ib.*
7. See AD QUOD DAMNUM, No. 6.

MISBEHAVIOUR IN OFFICE.

1. A justice of the peace may be amerced and removed from office upon an information against him in a superior court of criminal jurisdiction, for mis-

behaviour in office. *The Commonwealth* v. *Alexander*, 522

2. Being intoxicated with spirituous liquors, while in the discharge of his official duties, is a sufficient misbehaviour, for which a justice of the peace ought to be amerced and removed from office, *ib.*

3. In such case the jury's finding the defendant "guilty," is sufficient to authorize the judgment of amotion from office; but no farther testimony is admissible before the court, after the jury has been discharged, *ib.*

MORTGAGE.

1. Under circumstances, a bill of sale, though absolute on its face, will be deemed a mortgage; the true question always being whether a purchase of the property, or a loan of money or forbearance of a debt were intended.
☞ In this case, the circumstances proving the bill of sale to have been intended as a mortgage, were gathered from other writings and acts of the parties. *Dabney, &c.* v. *Green*, 101

2. A mortgagee, by obtaining a judgment at law for his debt, and purchasing the mortgaged property under execution thereupon, does not, in general, deprive the mortgagor of the right of redemption. But, if such judgment and execution were upon an attachment against the mortgagor, as an absconding debtor, attempting to defraud the mortgagee of his security by removing the property out of the state, he shall not be permitted to redeem, under the influence of the maxim, "that he who hath done iniquity shall not have equity," *ib.*

3. A *bona fide* mortgagee of a tract of land, without notice of any equitable lien in the original vendor, (of whom the mortgagor purchased,) is well authorized to purchase of the mortgagor a release of the equity of redemption, (even after notice from such vendor,) in consideration of any just claim of his upon the mortgagor, originating before such notice; but, after notice, the lien attaches for so much as he may have actually paid, or agreed to pay, for such release, over and above the claims for which the mortgage was taken, and which originated before the notice. *Duval* v. *Bibb*, 115

See VENDOR, No. 1.

4. A mortgage, by a father, including a slave belonging to his infant child who is deemed a purchaser for valuable consideration, will not defeat the right of the child, notwithstanding such child resided in his family, and there kept such slave, over whom it exercised every act of ownership. *Braxton* v. *Gaines and others*, 151

See PURCHASER, No. 3.

5. All deeds of trust and mortgages must be proved by three witnesses, or acknowledged by the party, and recorded within eight months, or they will be void as to creditors and subsequent purchasers, and they are only valid as to such, from the time when they are fully executed. *Jennings & Robinson* v. *The Attorney-General*, 424

6. Securities who had a lien on the property of their principal by mortgage, but which was defective, it being proved by two witnesses only, were permitted to stand in the place of the creditor as to the assets of the principal. *Miller, &c.* v. *Pendleton et al.* 436

7. A mortgagee cannot be compelled, in order to get hold of the mortgaged subject, to go into an account of the personal assets. *Patton* v. *Page*, 449

8. Where land has been sold under a decree to foreclose a mortgage, a jury will be directed to ascertain what proportion the value of the dower estate bore to that in remainder, and the sum found by the jury will be decreed to the tenant in dower. *Pelland et al.* v. *Underwood et al.* 469

MOTHER.

Construction of the act of descents, as to the mother's inheriting the estate from an infant child, on whom it descended from the great uncle of the infant. *Owen* v. *Cogbill and others*, 487

MOTION.

1. See SUMMARY PROCEEDINGS.

2. A motion is the proper mode of being

relieved against an execution, which is issued against a person not a party to the judgment. See *Moss and others* v. *Moss's Adm'r*, 293
3. A decree of a preceding term against a defendant, who was then dead, set aside on motion. *Hooe* v. *Barber et al.* 439
4. An answer filed by an infant may be amended, on motion, when he attains his age. *Winston* v. *Campbell*, 477
5. An order for an account is not to be made on a motion as of course, but upon a hearing only, unless the parties consent. *Cutting and Wife* v. *Carter*, 478
6. Objections to a *scire facias* to revive a suit cannot be made on motion. *Vaughan and Wife* v. *Wilson's Ex'r*, 480
7. A commission to examine one of the defendants as a witness should be awarded on the motion of the plaintiff in chancery, as a matter of course; saving all just exceptions. *Plainville* v. *Brown and others*, 482
8. A motion to be admitted as a defendant is not regular; but, in case of an injunction, if it appear that the person making the motion is interested in the subject of controversy, the court will order the injunction to be dissolved, unless the plaintiff will amend his bill, and make him a defendant. *Harrison* v. *Merton*, 483
9. After a bill of injunction has been taken for confessed for want of an answer, a motion will not be received from the defendant to discharge it as having been improvidently awarded. *Turpin, Adm'r of James*, v. *Jefferson*, 483
10. While a defendant is in contempt, no plea or demurrer can be admitted, but upon motion in open court. *Lane* v. *Ellsey*, 504

MUTUAL ASSURANCE SOCIETY.

See CORPORATIONS, and *Currie's Adm'rs* v. *Mutual Assurance Society*, 293

N

NEW TRIAL.

1. If a cause be remanded to an inferior court, and a new trial directed, the superior court must be presumed to have thought the declaration sufficient; consequently, on the new trial, or on a second appeal, no exception can be taken to the declaration. *Murdock, &c.* v. *Herndon's Ex'rs*, 200
2. If a superior court of common law, in reversing a judgment and awarding a new trial, assign the reason to be that certain evidence should have been received on the former trial, but fail to direct that, upon the new trial, such evidence shall be received, the court of appeals, in affirming its judgment, will add the proper direction concerning the evidence. *Brooke's Adm'rs* v. *Shelly*, 266
3. A discovery since a trial at law of new evidence, which, with ordinary diligence, the party might have known and obtained in time, is not a sufficient ground for a court of equity to grant a new trial. *Delima* v. *Glassell's Adm'r*, 369
4. A verdict obtained, at law, on the testimony of a single witness, whose answer (when he is brought into equity on the ground of his being a partner) is clearly contradicted, should be set aside, and a new trial directed. *Verdier* v. *Hume & Hume*, 479

NON-RESIDENTS.

1. A non-resident of a state sued in a court of such state has a right to remove the cause to the circuit court of the *United States*, on complying with the terms prescribed by the act of congress. See STATE COURT, No. 1. *Brown* v. *Crippin & Wise*, 173
2. In such case bond and security may be given, though the defendant be not personally present, *ib.*
3. A bill against a defendant, not an inhabitant of this country, and having no property therein, cannot be sustained. *Hopkirk* v. *Bridges*, 413
4. Practice of reviving against resident and non-resident defendants. *Duguid* v. *Patterson*, 445
5. A plaintiff in a superior court of chancery, not being an inhabitant of this commonwealth may be ruled to give security for the costs in that court; but not for costs incurred in the court of appeals, from which the suit was

remanded for farther proceedings. *Lambert* v. *Key*, 484

NOTICE.

1. The reasonable notice which the law requires upon taking depositions must depend upon circumstances. See DEPOSITIONS, No. 1. *Coleman* v. *Moody*, 1

2. An executor must, at his peril, take notice of a judgment against his testator, in what court soever it may have been rendered. See EXECUTORS and ADMINISTRATORS, No. 2. *Nimmo's Ex'r* v. *The Commonwealth*, 57

3. A *bona fide* mortgagee of a tract of land without notice of any equitable lien in the original vendor, (of whom the mortgagor purchased,) is well authorized to purchase of the mortgagor a release of the equity of redemption, (even after notice from the vendor,) in consideration of any just claim of his upon the mortgagor, originating before such notice; but after notice, the lien attaches for so much as he may have actually paid, or agreed to pay, for such release, over and above the claims for which the mortgage was taken, and which originated before the notice. *Duval* v. *Bibb*, 113

See VENDOR, No. 1.

4. Actual notice of a parol agreement between a vendor and vendee, (by virtue of which the vendor continued to live on the land, and was to retain possession until the contract on the part of the vendee should be fully complied with,) gives the vendor an equitable lien against a purchaser having such notice; notwithstanding his own conveyance was by a deed of absolute bargain and sale, *ib.*

See LIEN, No. 2.

5. A *bona fide* purchaser, without notice of the existence of any consideration other than that mentioned in the deed under which his vendor claims, is not to be affected thereby; but the law is otherwise as to a purchaser with notice, *ib.*

See EQUITY, No. 5.

6. A notice to take depositions given to the overseer of the party, who resided part of his time in the state, and part out, is insufficient. *Chapman* v. *Chapman*, 426

7. One month's previous notice to the opposite party, or his counsel, is requisite where objections are made for want of proof of any voucher on which a commissioner founds an item in his account; such objection not having been made before the commissioner himself. *Read's Ex'rs* v. *Winston et al.* 450

8. Where an order for an account is proper, it should not be directed in vacation, without notice to the adverse party, or his counsel. *Cutting and Wife* v. *Carter*, 478

NUISANCE.

A court of equity ought not to interpose in the case of a nuisance, except where the law would not afford an immediate nor an adequate remedy, until irreparable injury might be done. *Wingfield* v. *Crenshaw*, 474

O

OCCUPATION.

See USE and OCCUPATION.

OFFICE.

1. A justice of the peace may be amerced and removed from office, upon an information against him in a superior court of criminal jurisdiction for misbehaviour in office. *The Commonwealth* v. *Alexander*, 522

2. Being intoxicated with spirituous liquors, while in the discharge of his official duties, is a sufficient misbehaviour, for which a justice of the peace ought to be amerced and removed from office, *ib.*

3. In such case the jury's finding the defendant "guilty," is sufficient to authorize the judgment of amotion from office, *ib*

OFFICE JUDGMENTS.

A general demurrer is an issuable plea,

which ought to be received for the purpose of setting aside an office judgment. *Syme* v. *Griffin*, 277

OMISSION.

Although in committing a nuncupative will to writing, within six days from the speaking of the testamentary words, a distinct and independent part thereof be omitted, the residue of the will is not thereby vitiated. *Marks and Wife* v. *Bryant and Wife*, 91

ONUS PROBANDI.

See ACCOUNT, No. 2. *Nimmo's Ex'r* v. *The Commonwealth*, 57

OPEN ACCOUNTS.

The act of 1792, (1 *Rev. Code*, p. 167. s. 56.) which makes it the duty of the court, in actions against executors or administrators on open accounts, to expunge such items as appear to have been due more than 5 years before the death of the testator or intestate, applies to accounts existing before the 1st of *October*, 1793, when that act took effect; (see 1 *Rev. Code*, c. 150. p. 293.;) but it relates only to open accounts, and does not extend to settlements or assumptions; therefore, the plaintiff, to take his case out of the act, may give in evidence an *assumpsit* of the testator or intestate, within 5 years, to pay a stated balance. *Brooke's Adm'rs* v. *Shelly*, 266

P

PAROL EVIDENCE.

The word *increase* (without the word *future* prefixed) in the bequest of a female slave, is ambiguous; and, if the intention of the testator in using it cannot be ascertained from the whole will taken together, parol evidence is admissible to explain it. *Reno's Ex'rs* v. *Davis and Wife*, 288

PARTIES.

1. The vendee or his legal representatives, ought to be parties to a suit in chancery, brought by the vendor against a subsequent purchaser, to recover a balance alleged to be due from the vendee. *Duval* v. *Bibb*, 113
2. A motion to be admitted as a defendant is not regular; but, in case of an injunction, if it appear that the person making the motion is interested in the subject of controversy, the court will order the injunction to be dissolved, unless the plaintiff will amend his bill, and make him a defendant. *Harrison* v. *Morton*, 488
3. After publication of depositions, and the cause set down for hearing, the original bill cannot be amended by making new parties, or charging a new fact; but a supplemental bill may be offered. *Pleasants* v. *Logan*, 489

PARTITION.

Where two joint-tenants, of full age, and labouring under no legal disability, make partition of a tract of land, by deed, according to an old survey, (both being equally ignorant of its accuracy, and no fraud or misrepresentation appearing,) such division, however unequal, will be binding on them and their assigns. *Jones's Devisees* v. *Carter*, 184

PARTNERS.

In a settlement of accounts between copartners, the books of the copartnery are admissible evidence, and vouchers for every item need not be produced. *Brickhouse* v. *Hunter, Banks & Co.* 363

PARTNERSHIP.

A partner having withdrawn from a mercantile company, and being afterwards erroneously included in a suit against a new company formed by the other partners, may be relieved in equity against a judgment therein obtained, upon the ground that one of the company prevented his making

defence at law, by assuring him the matter should be adjusted. *Lee* v. *Baird et al.* 453

PATENT FOR LAND.

A patent for land, granted by a sister state, is one of those public acts to which every other state is bound to give full faith and credit, under the constitution of the *United States*; therefore, the validity of such patent cannot be collaterally drawn in question in the courts of any other state, on the suggestion that the survey on which it was founded was a forgery. *Lansly* v. *Fontaine*, 146

PAYMENTS.

What is the proper mode of calculating interest, where partial payments have been made. *Lightfoot* v. *Price*, 431

PAWN.

A consignee of goods may dispose of them in the way of trade, but he cannot pawn them for his own benefit, so as to devest the property of the consignor. In this case, the facts being clear, the consignors (the plaintiffs) are not to be turned round to a court of law, but a decree may be entered in their favour at once against the pawnees. *Skinner & Co.* v. *Dodge & Cobb et al.* 432

PENDENTE LITE.

Practice where the appellees took possession of the property belonging to the intestate of the appellant, pending the suit. *Wright* v. *Wright et al.* 452

PERSONAL PROPERTY.

1. If personal property be bequeathed, as well as real estate devised to the widow, the whole of such bequests and devises being averred to be in lieu of dower, her entering on the real estate is sufficient to shew her election to take the jointure; and in pleading, it is not necessary to state that she received the personal property also. *Ambler and Wife* v. *Norton*, 23
2. In suits to subject to the payment of debts, lands in the possession of heirs, the constant course, where there is no specific lien, is first to take an account of the personal assets. *M'Leod* v. *Roberts and others*, 443
3. But a mortgagee cannot be compelled, in order to get hold of the mortgaged subject, to go into an account of the personal assets. *Patton* v. *Page*, 449
4. In a suit by husband and wife, for the recovery of personal property in her right, if the husband dies, the right survives to her; and on her death the suit should not be revived in the name of his administrator. *Vaughan et ux.* v. *Wilson*, 452
5. A simple contract creditor shall receive, out of the real assets descended to the heirs at law, as much as has been paid to bond creditors out of the personal assets. *Haydon* v. *Goode et al.* 460
6. Though it is a matter of course for a remainder-man of personal chattels to file a bill against tenant for life, for an account and inventory of the property, yet the court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear some danger of its being wasted or put out of the way. *Mortimer* v. *Moffat and Wife*, 503

PLAINTIFF.

1. A court of equity will award an injunction to assist an execution levied on tobacco in a public warehouse, upon condition that the plaintiff will consent to a sale of the tobacco and a deposit of the proceeds in the bank. *Ogg* v. *Randolph and others*, 445
2. A verdict at law against a party is no bar to a decree in his favour, if he be brought into chancery by the adverse party: otherwise, if he were the plaintiff in equity. *Jones* v. *Jones*, 447
3. A commission cannot issue at the instance of a defendant to examine the plaintiff as a witness in the cause. *Ross* v. *Carter*, 488
4. A plaintiff in replevin may avail himself of a set-off, on the same principle that a defendant may prove discounts in any other suit. *Nicolson & Heth* v. *Hancock and others*, 491

5. The time allowed by a decree against an absent defendant, within which he might shew cause against it, having expired, the plaintiff is entitled to the benefit of the decree, without giving the security originally required by it. *Ross* v. *Austin*, 502

PLEADING.

See JOINTURE, No. 1. DOWER, No. 1.

1. In pleading, it is not necessary to set forth the whole of a will, but only the substance of so much thereof as relates to the point in question. *Ambler and Wife* v. *Norton*, 23
2. In averring a jointure in bar of dower, the failure to state in the plea, that the husband "being seised in fee of the premises" made the jointure, is not a substantial defect, nor sufficient to authorize the reversal of a judgment for the tenant, the demandant having failed to assign it as a cause of demurrer, *ib.*
3. In such plea it is not necessary to state expressly that the jointure was to take effect in possession immediately on the death of the husband, or that it was determinable by such acts only as would forfeit the dower at common law; it being incumbent on the demandant (in replying) to shew that any intervening estate existed, or that the jointure was subject to any condition other than the law imposes on a dowress, *ib.*
4. If personal property be bequeathed, as well as real estate devised to the widow, the whole of such bequests and devises being averred to be in lieu of dower, her entering on the real estate is sufficient to shew her election to take the jointure; and in pleading, it is not necessary to state that she received her personal property also, *ib.*
5. In pleading a jointure in bar of dower, it is not necessary to specify the name of the county in which the jointure land lies; provided the locality and identity of the land be described with reasonable certainty, *ib.*
6. See DECLARATION, No. 1. *Buster's Ex'r* v. *Wallace*, 82
7. See COVENANT, No. 2. *ib.*
8. Where a suit would have abated by the death of the plaintiff, and the defendants might have been permitted to plead *de novo*, if they omit to avail themselves of the death of the plaintiff, but, on the contrary, admit that certain persons are his surviving partners, and go to trial without asking permission to plead *de novo*, they are precluded from making the objection after verdict. *Murdock, &c.* v. *Herndon's Ex'rs*, 200
9. It is settled under our act of assembly, (1 *Rev. Code*, c. 66. s. 40. p. 80.) that a plea and demurrer at the same time to the whole declaration, are admissible. *Syme* v. *Griffin*, 277
10. A general demurrer is an issuable plea, which ought to be received for the purpose of setting aside an office judgment, *ib.*
11. In debt on bond with collateral condition, an assignment of a breach commencing "and whereas," &c. and continuing by way of recital to the end, without any direct averment, is insufficient, and such error is fatal on general demurrer, *ib.*
12. When a plea is set down for argument, the cause must be put on the court docket. *Hill* v. *Green*, 448
13. Objections to a *scire facias* to revive a suit cannot be made on motion: it should be by plea or demurrer, unless at the hearing the party do not entitle himself to revive. *Vaughan and Wife* v. *Wilson's Ex'r*, 480
14. A plea to the jurisdiction of a superior court of chancery, that a suit for the same matter, is depending in an inferior court, is proper. *Johnston* v. *Bower and others*, 476. 487
15. While a defendant is in contempt, no plea or demurrer can be admitted, but upon motion in open court. *Lane* v. *Ellzey*, 504
16. A defendant's being in contempt to the first process of the court is not a contempt to the decree, and forms no objection to his pleading to a *scire facias* brought to revive that decree, *ib.*
17. A defendant may plead to a *scire facias* brought to revive a decree which was obtained against him by default, that the original contract was usurious, *ib.*
18. A defendant after an order for an account, may move to set it aside, and file his answer, on paying the costs which may have accrued before the commissioner. *Lindsay* v. *Campbell & Wheeler and others*, 505

PLEAS.

1. It is settled under our act of assembly, (1 *Rev. Code*, c. 66. s. 40. p. 80.,) that a plea and demurrer, at the same time, to the whole declaration are admissible. *Syme* v. *Griffin*, 277
2. A general demurrer, is an issuable plea, which ought to be received for the purpose of setting aside an office judgment, *ib.*

POSSESSION.

1. To prevent length of time from barring a claim, on the ground that the possession of the defendant was fiduciary, such possession must have been fiduciary as to the plaintiff, or those under whom he claims: its being fiduciary as to any other person, is not sufficient. *Spotswood* v. *Dandridge and others*, 139
2. An executor having delivered certain slaves to legatees, as their property under the will, the act of limitations runs in their favour both at law and in equity, notwithstanding a subsequent action of *detinue* against him for other slaves held by the testator in the same right, *ib.*
3. Under what circumstances a child being a purchaser of a slave, will be considered as retaining possession, though residing in its father's family, and there keeping such slave. See PURCHASER, No. 3. *Braxton* v. *Gaines and others*, 151

PRACTICE.

1. A palpably frivolous bill of exceptions will not prevent an appeal from being taken up as a delay case: but if the point be in any degree doubtful, it is otherwise. *Fox* v. *Govan*, 156

See DELAY CASE.

2. The chancellor on dissolving an injunction, ought not, at the same time, to dismiss the bill, without the complainant's consent. See INJUNCTION, No 1. *Blow* v. *Taylor*, 159
3. Bond and security for complying with the requisitions of the act of congress on removing a cause from a state court to the circuit court of the *United States*, may be given, though the defendant be not personally present. *Brown* v. *Crippin & Wise*, 173
4. The court of appeals will direct their clerk to grant a certificate of their judgment, during term time, if it be absolutely necessary to attain the justice of the case, *ib.*
5. If a superior court of common law, in reversing a judgment and awarding a new trial, assign the reason to be that certain evidence should have been received on the former trial, but fail to direct that, upon the new trial, such evidence shall be received, the court of appeals, in affirming its judgment, will add the proper direction concerning the evidence. *Brooke's Adm'rs* v. *Shelly*, 266
6. It is settled, under our act of assembly, (1 *Rev. Code*, p. 80. c. 66. s. 40.,) that a plea and demurrer at the same time to the whole declaration, are admissible. *Syme* v. *Griffin*, 277
7. A general demurrer is an issuable plea, which ought to be received for the purpose of setting aside an office judgment, *ib.*
8. In debt on bond with collateral condition, an assignment of a breach, commencing "and whereas," &c. and continuing by way of recital to the end, without any direct averment, is insufficient; and such error is fatal on general demurrer, *ib.*
9. If one of two co-executors direct an appeal, writ of error, or *supersedeas*, originally granted to them both, to be dismissed, the other may proceed without him, and since both are before the court, an order of severance may be made without a summons. *Reno's Ex'rs* v. *Davis and Wife*, 288
10. In an action against several defendants, the *capias* being executed on part only, who appeared and defended the suit, and a discontinuance as to the rest having taken place, by a failure to take out further process against them, a judgment against the defendants in general terms must be understood as against those only who appeared, notwithstanding the declaration charged them all as "in custody," &c. and the caption of the entry of the judgment in the order book mentioned the names of all. *Moss and others* v. *Moss's Adm'r*, 293
11. Where there was an action on a joint and several bond against six obligors,

and the *capias* (which was against them all) was executed on two only, it was held that the plaintiff was not bound to sue out further process against the rest, but might take judgment against those two. In such case, it seems indifferent whether the declaration be against those two only, or against all named in the writ, provided the bond be properly described. *Moss and others* v. *Moss's Adm'r*, 293

12. If the clerk of an inferior court misconceive a judgment, and issue execution against any person not properly a party thereto, the remedy is not by *supersedeas*, or writ of error, but by motion to quash the execution; and if such motion be overruled, an appeal may be taken to the court of error, or application may be made for a writ of error, or *supersedeas*, to the order overruling such motion, *ib.*
13. Affidavits filed in support of a bill (there being no proof of notice) ought not to be regarded as testimony in the cause, unless it appear in the record that they were read, either by consent of parties or without opposition, when such opposition might have been made. *Braxton* v. *Lee's Heirs*, 376
14. It should appear that defendants in chancery, against whom a decree is entered, had answered the bill, or stood out process of contempt; and if this be omitted, a bill of review may be filed on the ground of error upon the face of the decree, *ib.*
15. In a decree against infants, time should be given them to make objections, after attaining their full age, *ib.*
16. When exceptions to depositions, taken after a cause is set for hearing, may be made. *Foster* v. *Sutton*, 401
17. A *scire facias* to revive a suit in chancery must be served by the sheriff or other officer. *Anonymous*, 401
18. An attachment to enforce a decree, pronounced against a person who was out of the commonwealth, cannot be awarded against him after his return, until twelve months have elapsed from the time of service of a copy of such decree. *Horton* v. *Horton*, 403
19. Rules as to amending answers in chancery. *Liggon* v. *Smith*, 405
20. Exception to the general rule that reports of commissioners must lie till the next term after that to which they are returned. *Chew* v. *Beverley et al.* 409
21. After a cause has been argued, a commission to take depositions cannot be obtained, but upon affidavit of the party, and by special order of the court for that purpose. *Anonymous*, 409
22. Rules of practice in reviving suits, and taking accounts before a commissioner. *Anonymous*, 410
23. Practice as to reviving, where the plaintiff dies, and there are absent and home defendants. *Yates* v. *Payne et al.* 412
24. A copy of the record must accompany every application for a *certiorari*. *Triplett* v. *Tyler*, 413
25. If an answer contain impertinent or scandalous matter, it will be referred to a commissioner to expunge such matter at the costs of the party filing the answer. *Mason* v. *Mason et al.* 414
26. A person having a suit at law depending on an appeal, and bringing a bill for relief as to the same subject matter, will be compelled to make an election in which court he will proceed. *Gibbs* v. *Perkinson*, 415
27. In a bill for an injunction, where relief might have been had at law, the plaintiff must state why he did not defend himself at law. *Yancey* v. *Fenwick*, 423
28. An interlocutory decree being affirmed in the court of appeals, does not change its terms, but it remains to be executed in the court of chancery, in the same manner as before the appeal. *Wilson* v. *Triplett*, 433
29. In what manner an attachment for not performing a decree of the court of chancery ought to be executed. *Lane* v. *Lane*, 437
30. A decree of a preceding term, against a defendant who was then dead, set aside on motion. *Hooe* v. *Barber et al.* 439
31. On what terms the answer of a defendant, against whom there has been a decree as an absentee, may be received, *ib.*
32. How *subpœnas* on foreign attachments should be endorsed. *Smith* v. *Jenny et al.* 440
33. How to proceed in introducing *viva voce* evidence at the hearing of a suit in chancery. *Emerson* v. *Berkley and Stone*, 441
34. Practice as to executing attachments

to compel an appearance. *Watts's Ex'rs* v. *Robertson*, 442
35. Proceedings on decrees *nisi*, *ib.*
36. How decrees on foreign attachments should be entered, *ib.*
37. In suits to subject to the payment of debts, lands in the possession of heirs, the constant course, where there is no specific lien, is first to take an account of the personal assets. *M'Loud* v. *Roberts and others*, 443
38. Practice of reviving against resident and non-resident defendants. *Duguid* v. *Patterson*, 445
39. A commissioner's report under an order made when the representatives of a deceased party were not before the court will be set aside, *ib.*
40. A report shewing a balance due from a defendant is not a sufficient ground for an order directing the money to be brought into court. The plaintiff should proceed to a decree which he may enforce by the usual process. *Campbell* v. *Braxton and others*, 446
41. Rule as to taking the account of a party as evidence against him. *Jones* v. *Jones*, 447
42. A verdict at law against a party is no bar to a decree in his favour, if he is brought into chancery by the adverse party: otherwise, if he were the plaintiff in equity, *ib.*
43. Where a plea is set down for argument, the cause must be put on the court docket. *Hill* v. *Green*, 448
44. If a party have an account taken as to a subject before decided by the court in the same cause, so much of the report will be at his own costs. *Corbin* v. *Beverley and others*, 448
45. A report made while a cause stood dismissed, and before it was reinstated, will be recommitted. *Williamson* v. *Childress*, 449
46. A mortgagee cannot be compelled, in order to get hold of the mortgaged subject, to go into an account of the personal assets. *Patton* v. *Page*, 449
47. Where an infant is decreed to do any act, he must have six months allowed him after he attains full age, to shew cause against the decree; but where lands are decreed to be sold for the payment of debts, there is no necessity unless he be directed to join in the conveyance, as the commissioners will execute the deed. *Wilkinson's Adm'r* v. *Oliver's Representatives*, 450
48. How objections for want of proof of any voucher, on which a commissioner founds an item in his account, are to be made. *Read's Ex'rs* v. *Weston and others*, 450
49. A motion for an account is irregular; it should be for a decree, which, if the court cannot enter without an account, it will direct one. *Hampton's Ex'rs* v. *Pollard*, 451
50. Practice where the appellees took possession of the property belonging to the intestate of the appellant pending the suit. *Wright* v. *Wright et al.* 452
51. An injunction in favour of an executor or administrator, on the ground of a deficiency of assets, should not be perpetual; but only until assets shall come to his hands to satisfy the judgment, or any part thereof, reserving to the creditor liberty to shew such assets by a *scire facias* at law. *Haydon* v. *Goode et al.* 460
52. A creditor admitted a party plaintiff, for the purpose of obtaining a proportion of an equitable fund, may, on filing his bill, at once prove his claim before a commissioner, (to whom the subject generally has been referred,) without waiting until the cause, as to him, shall have been set for hearing in the usual course of the court. *Anderson* v. *Anderson and others*, 475
53. After special demurrer to a bill, the plaintiff may have leave to amend on payment of costs. *Rose* v. *King*, 475
54. Practice where the plaintiff is proceeding in a superior court of chancery, and on the equity side of a county court for the same cause of action. *Johnston* v. *Bower and others*, 476
☞ See the same case, *postea*, p. 487
55. On a bill taken as confessed, the plaintiff cannot obtain a final decree, without filing his documents and proving his case. *Anonymous*, 476
56. An answer filed by an infant may be amended, on motion, when he attains his age. *Winston* v. *Campbell*, 477
57. An order for an account is not to be made as of course, but upon a hearing only, unless the parties consent: and where it would be proper, it should not be directed in vacation, without notice to the adverse party or his counsel. *Cutting and Wife* v. *Carter*, 478
58. A bill for discovery lies only in cases where the plaintiff's right cannot be established without the discovery sought for. It does not lie, therefore,

to discover the name of a negro child whose mother is known, nor the profits of slaves; of which a jury are the best judges. *Bass* v. *Bass*, 478

59. An action of detinue may be maintained for an infant negro child of such a mother, without any other description, *ib.*

60. A party on whom process to revive is served, is allowed one term from the return day of such process, to prepare for trial. *Minor* v. *Jones*, 480

61. A bill of revivor is unnecessary where a mere revival of the suit is sought; a *scire facias* being sufficient. *Vaughan and Wife* v. *Wilson's Ex'r*, 480

62. In what manner objections to a *scire facias* to revive a suit ought to be made, *ib.*

63. Practice where an injunction is awarded "until the coming in of the answer." *Beall* v. *Gibson*, 481

64. Where an injunction is awarded "until the coming in of the answer," the bill is to be dismissed at the ensuing term after the coming in of the answer, unless cause be shewn against it, *ib.*

65. Practice as to bringing in the defendant, by a messenger, to answer interrogatories. *Brown, Rives & Co.* v. *Wilson*, 481

66. Practice in appointing guardians to defend infants. *Chapman* v. *Turberville*, 482

67. A commission to examine one of the defendants as a witness should be awarded on the motion of the plaintiff, as a matter of course; saving all just exceptions. *Plainville* v. *Brown and others*, 482

68. A motion to be admitted as a defendant is not regular: but, in case of an injunction, if it appear that the person making the motion is interested in the subject of controversy, the court will order the injunction to be dissolved, unless the plaintiff will amend his bill, and make him a defendant. *Harrison* v. *Morton*, 483

69. After a bill of injunction has been taken for confessed, for want of an answer, a motion will not be received from the defendant to discharge it as having been improvidently awarded. *Turpin, Adm'r of James*, v. *Jefferson*, 483

70. After a decree for an account against a defendant, who is in contempt, and a report of the commissioner, such defendant can be permitted to file his answer on condition only that he do not delay the trial. *Fisher* v. *Fisher*, 484

71. After publication of depositions, and setting the cause for hearing, the original bill cannot be amended, but a supplemental bill may be offered. *Pleasants* v. *Logan*, 489

72. The rule which gives executors or administrators a term, after process of revival returned, is for their benefit; they may therefore waive it, and try the cause. *Chew* v. *Hoe*, 489

73. In a suit in equity against executors, it is not regular to enter a decree to be levied of the goods of the testator, without an account. *M'Rae* v. *Bates*, 490

74. The time allowed by a decree against an absent defendant, within which he might shew cause against it, having expired, the plaintiff is entitled to the benefit of the decree, without giving the security originally required by it. *Ross* v. *Austin*, 502

75. A home defendant, decreed to pay money to a creditor of an absent defendant, will be compelled to pay interest, unless he make a legal tender or bring the money into court, *ib.*

76. While a defendant is in contempt, no plea or demurrer can be admitted, but upon motion in open court. *Lane* v. *Ellzey*, 504

77. A defendant's being in contempt to the first process of the court is not a contempt to the decree, and forms no objection to his pleading to a *scire facias* brought to revive that decree, *ib.*

78. A defendant may plead to a *scire facias*, brought to revive a decree, which was obtained against him by default, that the original contract was usurious, *ib.*

79. A defendant after an order for an account, may move to set it aside, and file his answer, on paying the costs which may have accrued before the commissioner. *Lindsay* v. *Campbell & Wheeler and others*, 505

☞ See ADDITIONAL RULES OF PRACTICE in the superior court of chancery for the *Richmond* district, 521

PRINCIPAL.

1. In cases of usury, the borrower filing his bill in equity is entitled to relief, not against the contract entirely, but to the amount of all but the principal money; the lender being entitled to

receive his principal without any interest. *Marks* v. *Morris*, 463
2. In such cases, though relief be given against the interest, the usurious assurances remain as a security for the principal; and the court will direct them to be enforced to that extent, if it be not paid by a given day, *ib.*

PRINCIPAL AND ATTORNEY.

How an attorney may sign the name of his principal to a deed. See *Jones's Devisees* v. *Carter*, 184

PRISON BOUNDS, BOND.

A bond taken by the sheriff, of a debtor in custody, conditioned that such debtor shall keep within certain prison bounds, "until he shall have discharged the debt and costs, and save harmless the said sheriff," is illegal and void. It should be, simply, "that he shall not depart or go out of the rules or bounds of the prison to which he was committed." *Syme* v. *Griffin*, 277

PROBATE.

1. In every case of an appeal in a controversy concerning the probate of a will, the original paper exhibited for probate ought to be brought before the appellate court, by writ of *subpœna duces tecum*. If such paper cannot be had, the order admitting it to record, or rejecting it, ought neither to be affirmed nor reversed; but the appeal should be dismissed. *Marks and Wife* v. *Bryant and Wife*, 91
2. A nuncupative will, not made at the habitation of the deceased, nor where he had resided for ten days next preceding, but authenticated, as the law requires, ought to be established, notwithstanding his being very unwell when he left home; if, afterwards, he was taken more dangerously ill, and died at the place where such will was made, *ib.*
3. Although, in committing a nuncupative will to writing, within six days from the speaking of the testamentary words, a distinct and independent part thereof be omitted, the residue of the will is not thereby vitiated, *ib.*
4. A testator's bequeathing (among other things) an article of property which does not belong to him, is, at most, only a circumstance from which to infer a state of mind unfavourable to the making of a testament; and ought not to prevail against positive testimony, shewing his competency to make a will at the time in question. *Marks and Wife* v. *Bryant and Wife*, 91

PROCESS.

1. A sheriff is liable to the action of the party, at common law, for not executing and returning the process of the courts of chancery; but *quære*, whether he is liable to attachment? *Ronald* v. *Bentley et al.* and *Harmer* v. *Key*, 461
2. A party on whom process to revive is served, is allowed one term, from the return day of such process, to prepare for trial. *Minor* v. *Jones*, 480
3. A bill of revivor is unnecessary where a mere revival of the suit is sought; a *scire facias* being sufficient. *Vaughan and Wife* v. *Wilson's Ex'r*, 480
4. How objections to a *scire facias* to revive ought to be made, *ib.*
5. How the performance of decrees for alimony is to be enforced, where the defendant stands out process of contempt. *Purcell* v. *Purcell*, 507
6. A defendant's being in contempt to the first process of the court is not a contempt to the decree, and forms no objection to his pleading to a *scire facias* brought to revive that decree. *Lane* v. *Ellzey*, 504

PROFITS

1. Of slaves accruing after a judgment in detinue, during the pendency of an appeal cannot be recovered, by a suit in equity. *Alderson* v. *Biggers and others*, 470
2. A suit in chancery is not the proper remedy to recover the profits of slaves; of which a jury are the best judges. *Bass* v. *Bass*, 478

PROMISSORY NOTE.

The assignee of a bond or note is not bound, if the maker be notoriously insolvent, to sue him before he can resort to the assignor. *Saunders* v. *Marshall et al.* 455

PROOF.

1. Objections for want of proof of any voucher, on which a commissioner founds an item in his account, must generally be made before the commissioner himself, in which case, if such proof be not supplied, it may be called for at the hearing; but in no other instance, unless for good cause shewn, and upon one month's previous notice. *Read's Ex'rs* v. *Winston et al.* 450

2. In what case proof of a creditor's claim may be exhibited before a commissioner immediately on filing his bill. *Anderson* v. *Anderson and others*, 475

3. On a bill taken as confessed, the plaintiff cannot obtain a final decree, without filing his documents, and proving his case. *Anonymous*, 476

PUBLICATION.

After publication of depositions, and the cause set down for hearing, the original bill cannot be amended by making new parties, or charging a new fact; but a supplemental bill may be offered. *Pleasants* v. *Logan*, 489

PURCHASE.

1. To determine whether a conveyance, though absolute on its face, is to be considered a bill of sale, or a mortgage, the true question always is, whether a purchase of the property, or a loan of money, or forbearance of a debt, were intended. *Dabney, &c.* v. *Green*, 101

See MORTGAGE, No. 1.

2. A mortgagee, by obtaining a judgment at law for his debt, and purchasing the mortgaged property under execution thereupon, does not, in general, deprive the mortgagor of the right of redemption, *ib.*

See MORTGAGE, No. 2.

3. In what case a mortgagee may, by purchasing a release of the equity of redemption, defeat the equitable lien of a person who sold to the mortgagor. *Duval* v. *Bibb*, 113

See VENDOR, No. 1.

4. A vendor may retain, under circumstances, an equitable lien on the land for the purchase-money, notwithstanding he conveyed his title by an absolute deed of bargain and sale. *Duval* v. *Bibb*, 113.

See VENDOR, No. 2.

PURCHASER.

See PURCHASE.

1. In equity, either party to a deed may aver and prove against the other, or against a purchaser with notice, the true consideration on which the deed was founded, though a different consideration be mentioned therein; but a *bona fide* purchaser, without notice of the existence of such consideration is not to be affected thereby. *Duval* v. *Bibb*, 113

2. The vendee or his legal representatives, ought to be parties to a suit in chancery brought by the vendor against a subsequent purchaser, to recover a balance alleged to be due from the vendee, *ib.*

3. Where a child, who is an infant, is deemed a purchaser, for valuable consideration, of a slave, the circumstance that such child resides in the family of its father, and there keeps the slave, over whom it exercises every act of ownership, will not entitle the creditors of the father to disturb the possession of the child, although the father had included the slave in a mortgage, to indemnify the mortgagees against certain securityships. *Braxton* v. *Gaines and others*, 151

4. If I. J. purchase at so much per acre of C. C. "all a certain tract of land, called by a certain name, situate in the county of L. conveyed to the said C. C. by R. C. by deed of a certain date, said to be a moiety of a larger tract granted to an ancestor of R. C. and comprehending the lots and land laid down in a certain survey," this is a purchase by metes and bounds, by virtue of which I. J. is entitled to no more than the land within the limits of such survey. *Jones's Devisees* v. *Carter*, 184

5. A purchase of land, by an executor, which had been sold by him agreeably to the will of his testator, is va-

lid, if it appear that his conduct in the sale was fair and correct. *M'Key, Ex'r of Fuqua, v. Young,* 430

6. A purchaser of land devised to be sold by executors in general terms, derives no title in law or equity from a conveyance made by two out of three executors; all having qualified, and being alive at the date of such conveyance; nor would the payment of the purchase-money, in such case, create any lien on the land. *M'Rae v. Farrow,* 444

7. After a judgment in detinue for slaves, the plaintiff cannot recover them by a suit in equity from persons purchasing from the defendant; his proper remedy being at law. *Alderson v. Biggins and others,* 470

Q

QUOD CUM.

See WHEREAS, and *Syme v. Griffin,* 277

R

REAL ESTATE.

See LAND.

1. A widow's entering on real estate devised, together with personal property, in lieu of her dower, is sufficient to shew her election to take the jointure. See PERSONAL PROPERTY, No. 1. *Ambler and Wife v. Norton,* 23

2. A simple contract creditor shall receive, out of the real assets descended to the heirs at law, as much as has been paid to bond creditors out of the personal assets. *Haydon v. Goode et al.* 460

RECEIPT.

A receipt at the foot of a deed of bargain and sale for the consideration expressed therein, will not, under circumstances, prevent the vendor from retaining an equitable lien on the land. *Duval v. Bibb,* 113

See LIEN, No. 2.

RECITAL.

In debt on bond with collateral condition, an assignment of a breach commencing, "and whereas," &c. and continuing by way of recital to the end, without any direct averment, is insufficient; and such error is fatal on general demurrer. *Syme v. Griffin,* 277

RECORD.

1. What is a sufficient setting forth in the record of the return of a writ of *ad quod damnum.* See AD QUOD DAMNUM, No. 6. *Coleman v. Moody,* 2

2. When a cause is brought up to a superior court upon a bill of exceptions, the court will inspect the whole record, and, if there be any error, will reverse the judgment, though they may be of opinion that the court below decided rightly on the particular point on which the exceptions were taken. *Murdock, &c. v. Herndon's Ex'rs,* 200

REINSTATEMENT.

1. Where an injunction is awarded "until the coming in of the answer," it is, of course, at an end when the answer comes in; so that it is unnecessary for the defendant to move to dissolve; but the plaintiff may move to reinstate. *Beall v. Gibson,* 481

2. In such case, if the injunction be not reinstated, the bill is to be dismissed under the act of assembly, unless cause be shewn against it at the ensuing term, after the coming in of the answer, ib.

RELEASE.

A *bona fide* mortgagee of a tract of land, without notice of any equitable lien in the original vendor, (of whom the mortgagor purchased,) is well authorized to purchase of the mortgagor a release of the equity of redemption, (even after notice from the vendor,) in consideration of any just claim of his upon the mortgagor, originating before such notice; but

after notice the lien attaches, for so much as he may have actually paid, or agreed to pay, for such release, over and above the claims for which the mortgage was taken, and which originated before the notice. *Duval* v. *Bibb*, 113

See VENDOR, No. 1.

RELIEF.

1. Under what circumstances relief may be obtained in equity, by a person formerly a partner, but who has withdrawn from a mercantile concern, against a judgment erroneously obtained against him as a member of a new company formed by the other partners. *Lee* v. *Baird et al.* 453
2. Cannot be obtained in equity where a party has appealed from a judgment at law on the same subject matter, and has not prosecuted his appeal. *Saunders* v. *Marshall et al.* 455
3. Nor by a plaintiff being both heir and administrator, (and seeking relief as administrator,) unless he will do equity as heir. *Haydon* v. *Goode et al.* 460
4. How far relief may be obtained in equity by the borrower in cases of usury. *Marks* v. *Morris*, 463

See USURY.

5. To what extent the usurious lender will be relieved, *ib.*

See USURY.

6. Unless the plaintiff can shew, from some peculiar circumstances not within his control, that he could not be relieved at law, he shall not be permitted to come into a court of equity. *Nicolson & Heth* v. *Hancock and others*, 491
7. An injunction will not be awarded to stay a suit against a sheriff for selling property taken in execution, because the law provides him an ample remedy. *Storrs* v. *Payne and others*, 506

REMAINDER.

1. In what manner the value of a dower estate, in proportion to that in remainder, may be ascertained. See *Pollard et al.* v. *Underwood et al.* 459
2. Though it is a matter of course for a remainder-man of personal chattels to file a bill against tenant for life, for an account and inventory of the property, yet the court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear some danger of its being wasted or put out of the way. *Mortimer* v. *Moffatt and Wife*, 503

REMOVAL FROM OFFICE.

See AMOTION FROM OFFICE.

REPLEVIN.

A plaintiff in replevin may avail himself of a set-off, on the same principle that a defendant may prove discounts in any other suit. *Nicolson & Heth* v. *Hancock and others*, 491

REPLICATION.

In pleading a jointure in bar of dower, it is not necessary to state expressly that the jointure was to take effect in possession immediately on the death of the husband, or that it was determinable by such acts only as would forfeit the dower at common law, it being incumbent on the demandant (in replying) to shew that any intervening estate existed, or that the jointure was subject to any condition, other than the law imposes on a dowress. *Ambler and Wife* v. *Norton*, 23

REPORTS OF COMMISSIONERS.

Exception to the general rule, that reports of commissioners must lie till the next term after that to which they are returnable. *Chew* v. *Beverley and others*, 409

RETURN.

What is a sufficient setting forth in the record of the return of a writ of *ad quod damnum*. See AD QUOD DAMNUM, No. 6. *Coleman* v. *Moody*, 2

RETURN DAY.

A party on whom process to revive is served, is allowed one term from the return day of such process to prepare for trial. *Minor* v. *Jones*, 480

REVIEW, BILL OF.

What are the proper grounds for a bill of review. *Quarrier* v. *Carter's Representatives*, 242

REVIVOR.

1. Rules of practice as to reviving a suit which had abated by the death of a party. *Anonymous*, 410
2. Practice as to reviving where the plaintiff dies, and there are absent and home defendants. *Yates* v. *Payne et al.* 412
3. Practice of reviving against resident and non-resident defendants. *Duguid* v. *Patterson*, 445
4. In a suit by husband and wife, for the recovery of personal property in her right, if the husband die, the right survives to her; and, on her death, the suit should not be revived in the name of his administrator. *Vaughan et ux.* v. *Wilson*, 452
5. A party on whom process to revive is served, is allowed one term from the return day of such process, to prepare for trial. *Minor* v. *Jones*, 480
6. A bill of revivor is unnecessary where a mere revival of the suit is sought; a *scire facias* being sufficient. *Vaughan and Wife* v. *Wilson's Ex'r*, 480
7. How objections to a *scire facias* to revive, ought to be made, *ib.*
8. The rule which gives executors or administrators a term after process of revival returned, is for their benefit; they may therefore waive it and try the cause. *Chew* v *Hoe*, 489
9. A defendant's being in contempt to the first process of the court, is not a contempt to the decree, and forms no objection to his pleading to a *scire facias* brought to revive that decree. *Lane* v. *Ellzey*, 504
10. A defendant may plead to a *scire facias* brought to revive a decree which was obtained against him by default, that the original contract was usurious, *ib.*

RULES OF PRACTICE,

In the superior court of chancery for the *Richmond* district, 410
1. No suit is to be revived without the names of the representatives of the deceased party. *Anonymous*, 410
2. The clerk may, either in or out of court, issue process to revive when the proper names are furnished, and not before, *ib.*
3. Unless such process be executed with all due diligence, the benefit thereof may be lost to the party who obtained it, *ib.*
4. An order for an account must be executed within twelve months, *ib.*
☞ ADDITIONAL RULES OF PRACTICE, 521

S

SCANDAL.

If an answer in chancery contain impertinent or scandalous matter, it will be referred to a commissioner to expunge such matter at the costs of the party filing the answer. *Mason* v. *Mason et al.* 414

SCIRE FACIAS.

1. No length of time can bar the commonwealth from execution on a judgment in its favour, nor even render it necessary to sue out a *scire facias* to entitle it to such execution. *Nimmo's Ex'r* v. *The Commonwealth*, 57
2. A *scire facias* to revive a suit in chancery must be served by a sheriff or other officer to whom it is directed; service by a private person is not sufficient. *Anonymous*, 401
3. An injunction in favour of an executor or administrator, on the ground of a deficiency of assets, should not be perpetual; but only until assets shall come to his hands to satisfy the judgment, or any part thereof; reserving to the creditor liberty to shew such assets by a *scire facias* at law. *Haydon* v. *Goode et al.* 460
4. A bill of revivor is unnecessary where a mere revival of the suit is sought;

a *scire facias* being sufficient. *Vaughan and Wife* v. *Wilson's Ex'r*, 480
In what manner objections to a *scire facias* to revive a suit ought to be made, *ib.*
5. A defendant's being in contempt to the first process of the court is not a contempt to the decree, and forms no objection to his pleading to a *scire facias* brought to revive that decree. *Lane* v. *Ellzey*, 504
6. A defendant may plead to a *scire facias* brought to revive a decree, which was obtained against him by default, that the original contract was usurious, *ib.*

SECURITIES,

1. Of sheriffs, when not bound for the second year's collection of taxes. See SHERIFFS, and *The Commonwealth* v. *Fairfax and others*, 208
2. Securities who had a lien on the property of their principal by mortgage, but which was defective, it being proved by two witnesses only, were allowed to stand in the place of the creditor as to the assets of the principal. *Miller, &c.* v. *Pendleton et al.* 436

SECURITY.

1. For what costs a plaintiff in a superior court of chancery, not being an inhabitant of this commonwealth, may be ruled to give security. *Lambert* v. *Key*, 484
2. The time allowed by a decree against an absent defendant, within which he might shew cause against it, having expired, the plaintiff is entitled to the benefit of the decree, without giving the security originally required by it. *Ross* v. *Austin*, 502
3. A court of equity will not rule a tenant for life of personal property to give security to have it forthcoming at his death, unless there appear some danger of its being wasted or put out of the way. *Mortimer* v. *Moffatt and Wife*, 503
4. A wife, being a lunatic, and put under the care of a committee by the county court, will be restored to her husband by a decree of the superior court of chancery, upon his giving bond and security according to law. *Coleman's case*, 506

SET-OFF.

A plaintiff in replevin may avail himself of a set-off, on the same principle that a defendant may prove discounts in any other suit. *Nicolson & Heth*, v. *Huncock and others*, 491

SETTLEMENTS

Of accounts, not affected by the act of 1792, (1 *Rev. Code*, p. 167. s. 56.) which makes it the duty of the court to expunge such items as appear to be due more than 5 years before the death of the testator or intestate; but his *assumpsit*, within 5 years, to pay a stated balance, may be given in evidence to take the case out of the act. See *Brooke's Adm'rs* v. *Shelly*, 266

SEVERANCE.

If one of two co-executors direct an appeal, writ of error, or *supersedeas*, originally granted to them both, to be dismissed, the other may proceed without him, and since both are before the court, an order of severance may be made without a summons. *Reno's Ex'rs* v. *Davis and Wife*, 288

SHERIFFS.

1. The true construction of the law concerning the appointment and duties of sheriffs, requires that they should be annually nominated and commissioned, and should annually give bond for the faithful collection of the taxes, &c.: therefore, in this case, the high sheriff having been nominated and commissioned for one year only, and having acted the second year without a new nomination and commission, and not having renewed his bond, it was held, that the securities for the first year were not liable for the taxes collected by the high sheriff for the second. *Commonwealth* v. *Fairfax and others*, 208
2. A bond taken by the sheriff, of a debtor in custody, conditioned that such debtor shall keep within certain pri-

son bounds, "until he shall have discharged the debt and costs, and save harmless the said sheriff," is illegal and void. It should be, simply, "that he shall not depart or go out of the rules or bounds of the prison to which he was committed. *Syme* v. *Griffin*, 277

3. An execution directed to the sheriff of ——, may be executed by the serjeant of a corporate town. *Purcell* v. *Richardson*, 404

4. A sheriff is liable to the action of the party, at common law, for not executing and returning the process of the courts of chancery: but *quære*, whether he is liable to attachment? *Ronald* v. *Bentley et al.* and *Harmer* v. *Key*, 461

5. A sheriff may file a bill of interpleader, to settle the rights of property, taken in execution, to which there are conflicting claims: but an injunction will not be awarded to stay any suit against him, in case of his selling the property; because the law provides him an ample remedy. *Storrs* v. *Payne and others*, 506

SIMPLE CONTRACT.

A simple contract creditor shall receive, out of the real assets descended to the heirs at law, as much as has been paid to bond creditors out of the personal assets. *Haydon* v. *Goode et al.* 460

SLAVES.

1. Money paid for the hire of slaves (hired by an executor or administrator) to make a crop on the land of the decedent under the care of such executor or administrator, the proceeds of such crop being credited to the estate, should be debited against it in preference to the claim of any creditor of the decedent. *Nimmo's Ex'r* v. *The Commonwealth*, 57

See EXECUTORS AND ADMINISTRATORS, No. 3.

2. An executor having delivered certain slaves to legatees, as their property under the will, a subsequent action of *detinue* against him, for other slaves which the testator held in the same right, is not sufficient, though prosecuted to a judgment, to prevent the act of limitations from running, both at law and in equity, in favour of the legatees. *Spotswood* v. *Donaldson and others*, 140

3. A child being a purchaser of a slave, may be protected against its father's creditors, though residing in the family, and there keeping such slave. See PURCHASER, No. 3. *Brannen* v. *Gaines and others*, 151

4. The word *increase* (without the word *future* prefixed) in the bequest of a female slave, is ambiguous; and, if the intention of the testator in using it cannot be ascertained from the whole will taken together, parol evidence is admissible to explain it. *Reno's Ex'rs* v. *Davis and Wife*, 288

5. If the plaintiff obtain a judgment in detinue for slaves, and their profits to the rendition of the judgment, he cannot come into equity for the profits which afterwards accrued pending an appeal, nor to recover their increase not included in such judgment, nor to compel the delivery of them by purchasers from the defendant. *Alderson* v. *Biggars and others*, 470

6. A bill in chancery does not lie for discovery of the name of a negro child whose mother is known, nor for the profits of slaves; of which a jury are the best judges. *Base* v. *Base*, 478

7. An action of detinue may be maintained for an infant negro child of such a mother, without any other description, ib.

STATE COURT.

1. It is a matter of right in the defendant, who is a non-resident of a state, and is sued in a state court, to remove the cause to the circuit court of the *United States*, for such state, on complying with the terms prescribed by the act of congress; and if the inferior court refuse to allow the removal of the cause, it may be compelled by *mandamus* emanating from the superior court of the state, not from the circuit court of the *United States*. *Brown* v. *Crippin and Wise*, 173

2. Bond and security for complying with the requisitions of the act of congress, on removing a cause from a state court to the circuit court of the *Uni-*

ted States, may be given, though the defendant be not personally present, *ib.*

3. See PATENT FOR LAND, No. 1. *Lassly* v. *Fontaine*, 146

STATUTES.

See ACTS OF ASSEMBLY.

1. Independently of the stat. 11 *Geo.* II. c. 19. *assumpsit* lies at common law for use and occupation of land, by permission and assent of the plaintiff, on an express promise to pay the plaintiff a certain sum, or in general terms, to pay him to his satisfaction for such use and occupation. See ASSUMPSIT, No. 1. *Eppes* v. *Cole*, 161
2. *It seems*, that such action is also maintainable without proof of an express promise. But the point was left open in this case. *Ideo quære?* *ib.*

SUBPŒNA DUCES TECUM.

In every case of an appeal in a controversy concerning the probate of a will, the original paper exhibited for probate ought to be brought before the appellate court, by writ of *subpœna duces tecum*. See APPEAL, No 1. *Marks and Wife* v. *Bryant and Wife*, 91

SUBPŒNA.

How *subpœnas* on foreign attachments should be endorsed. *Smith* v. *Jenny et al.* 440

SUBSTANCE.

1. In pleading, it is not necessary to set forth the whole of a will, but only the substance of so much thereof as relates to the point in question. *Ambler and Wife* v. *Norton*, 23
2. In averring a jointure in bar of dower, the failure to state in the plea, that the husband "being seised in fee of the premises" made the jointure, is not a substantial defect, nor sufficient to authorize the reversal of a judgment for the tenant, the demandant having failed to assign it as a cause of demurrer, *ib.*
3. In declaring on a covenant, it is sufficient to set out the substance and legal effect only of such parts of the deed as are necessary to entitle the plaintiff to recover. *Buster's Ex'r* v. *Wallace*, 82

See COVENANT, No. 1.

SUMMARY PROCEEDINGS.

1. Under the act of 1796, c. 31. authorizing the mayor and commonalty of *Alexandria* to recover by motion the amount of moneys assessed for paving the streets, a judgment (in terms) for such assessments, "and also for the taxes of the town," cannot be sustained; notwithstanding, from the account exhibited, it appear that such judgment was actually intended to be for no more than the sum due for such assessments. *Mayor, &c. of Alexandria* v. *Chapman*, 270
2. The defendant having proved, in opposition to such motion, that he had personal property in *Alexandria*, of greater value than the amount of the assessment; *quære*, is he bound, moreover, to prove that the serjeant of the town had knowledge of such property, and that a distress could have been levied upon it? *ib.*
3. *Quære*, where a judgment is obtained by motion in a summary way, under a private act of assembly, is it necessary, in stating the evidence in a bill of exceptions or case agreed, to mention that such act was read, or given in evidence to the court? *ib.*
4. Also *quære*, where an act of assembly authorizes a judgment by motion in a summary way in the court of the county where the defendant resides, is it necessary, if no objection to the jurisdiction appear in the record, that it should have been stated therein that the defendant was actually a resident of the county, to the court of which the motion was made, *ib.*

SUMMONS AND SEVERANCE.

If one of two co-executors direct an appeal, writ of error, or *supersedeas*, originally granted to them both, to be dismissed, the other may proceed without him; and since both are be-

fore the court, an order of severance may be made without a summons. *Reno's Ex'rs* v. *Davis and Wife*, 288

SUPERIOR COURTS.

A justice of the peace may be amerced and removed from office, upon an information against him in a superior court of criminal jurisdiction for misbehaviour in office. *The Commonwealth* v. *Alexander*, 522

SUPERSEDEAS.

If the clerk of an inferior court misconceive a judgment, and issue execution against any person not properly a party thereto, the remedy is not by *supersedeas* or writ of error, but by motion to quash the execution; and if such motion be overruled, an appeal may be taken to the court of error, or application may be made for a writ of error or *supersedeas* to the order overruling such motion. *Moss and others* v. *Moss's Adm'r*, 293

SUPPLEMENTAL BILL.

A supplemental bill may be offered after publication of depositions, and setting the cause for hearing; but the original bill cannot be amended. *Pleasants* v. *Logan*, 489

SURETY.

It is no ground for relieving in equity either the principal or the sureties in a forthcoming bond, that the principal was not the owner of the property specified therein, or had only a qualified interest. *Syme and others* v. *Montague*, 180

SURVEYS.

1. Mistaken descriptions in surveys or conveyances ought to be disregarded when compared with natural or reputed boundaries, or lines of marked trees. *Dogan* v. *Seekright, Lessee of Carter*, 125
2. See BOUNDARIES, No. 2. *ib.*
3. The validity of a patent for land granted by a sister state cannot be collaterally drawn in question, in the courts of any other state, on the suggestion that the survey on which it was founded was a forgery. See PATENT FOR LAND, No. 1. *Lessly* v. *Fontaine*, 146

SURVIVORSHIP.

1. In an action against the representatives of a person deceased, on a joint covenant entered into before the act "concerning partitions and joint rights and obligations," if it appear from the declaration, that one of the joint covenantors survived, it is a radical defect, and not cured by verdict. *Atwell's Adm'rs* v. *Milton*, 253
2. In a suit by husband and wife, for the recovery of personal property in her right, if the husband die, the right survives to her; and on her death the suit should not be revived in the name of his administrator. *Langhorne et ux.* v. *Wilson*, 452

T

TAXES.

1. The commonwealth's taxes on the property are to be paid in preference to the claim of any creditor of a decedent. *Nimmo's Ex'r* v. *The Commonwealth*, 57

See EXECUTORS AND ADMINISTRATORS, No. 3.

2. An heir is not bound for taxes due from the ancestor. *Hayden* v. *Goode et al.* 460

TENDER.

A home defendant decreed to pay money to a creditor of an absent defendant, will be compelled to pay interest, unless he make a legal tender, or bring the money into court, *Ross* v. *Austin*, 502

TOBACCO.

The aid of a court of equity is necessary and proper in assisting process of execution levied on tobacco in public warehouses. *Ogg* v. *Randolph and others*, 449

TRIAL.

The rule which gives executors or administrators a term after process of

revival returned, is for their benefit: they may therefore waive it and try the cause. *Chew* v. *Hoe*, 489

TRUST.

To prevent length o time from barring a claim, on the ground that the possession of the defendant was fiduciary, such possession must have been fiduciary as to the plaintiff, or those under whom he claims. *Spotswood* v. *Dandridge and others*, 139

See POSSESSION, No. 1.

TRUST, DEED OF.

1. J. B. being indebted to certain *British* merchants, conveyed a tract of land, and sundry slaves, in trust, to secure the payment of the debt, in three equal annual instalments, with interest from the date of the deed of trust; the payments to be made in tobacco, to be delivered at, and addressed to them in *London*, on which they were to draw the usual and accustomed mercantile commission of 21 shillings sterling for each hogshead actually shipped; and it was further provided, that in case of non-shipment of the tobacco, a further sum equivalent to, and in lieu of, the usual mercantile commission therein, at the rate of 21 shillings sterling per hogshead, estimating each hogshead to be worth 10*l.* sterling, was to be added to each payment; held that the transaction was usurious, and the deed of trust void. *Pollard* v. *Baylor's Devisees*, 223
2. How far it must appear that the proceedings on a sale under a deed of trust, must pursue the terms of the deed. *Ib.* 223, *n.*
3. All deeds of trust and mortgages must be proved by three witnesses, or acknowledged by the party, and recorded within eight months, or they will be void as to creditors and subsequent purchasers, and they are only valid as to such, from the time when they are fully executed. *Jennings & Robinson* v. *The Attorney-General*, 424

TRUSTEE,

1. By appearing and contesting on its merits a motion for leave to erect a mill, may be precluded from afterwards saying that he was not legally summoned as the tenant or proprietor of the land. *Coleman* v. *Moody*, 2

See MILLS, No. 1.

2. In what cases trustees are liable to pay interest on the trust money retained in their hands; and how they may discharge themselves from such liability. *Miller* v. *Beverleys, &c.* 415
3. Compensation allowed to trustees for executing the trust, *ib.*
4. How far a trustee allowed for disbursements made by him, without the consent of his co-trustees, *ib.*
5. What evidence ought to be required by a commissioner as to certain items of disbursements, *ib.*
6. A purchase of land by an executor, which had been sold by him agreeably to the will of his testator, is valid if it appear that his conduct in the sale was fair and correct. *M'Key, Ex'r of Fuqua*, v. *Young*, 430
7. In what cases trustees, executors, or administrators shall pay costs out of their own estates. *Sorrel* v. *Proctor*, 431

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UNITED STATES.

See CIRCUIT COURT OF THE UNITED STATES.

See also PATENT FOR LAND, No. 1. *Lassly* v. *Fontaine*, 145

USE AND OCCUPATION.

1. *Assumpsit* for use and occupation of land, by permission and assent of the plaintiff, on an express promise, lies at common law. See ASSUMPSIT, No. 1. *Eppes* v. *Cole*, 161
2. *Quære*, as to an implied promise? *ib.*

☞ N. B. In the case of *Sutton* v. *Mandeville*, it has since been decided, that the action lies on an implied promise.

USURY.

1. J. B. being indebted to certain *British* merchants, conveyed a certain tract of land and sundry slaves, in trust, to secure the payment of the debt,

ed in lieu of dower, though not so expressed. See INTENTION, No. 1. *Ambler and Wife* v. *Norton*, 23

2. In pleading, it is not necessary to set forth the whole of a will, but only the substance of so much thereof as relates to the point in question, *ib.*

3. See JOINTURE, No. 5. *ib.*

4. The proceeds of the sale of land, directed by a will to be sold for the payment of debts, are equitable assets. See ASSETS, No 2. *Nimmo's Ex'r* v. *The Commonwealth*, 57

5. In every case of an appeal in a controversy concerning the probate of a will, the original paper exhibited for probate ought to be brought before the appellate court, by writ of *subpæna duces tecum*. See PROBATE, No. 1. *Marks and Wife* v. *Bryant and Wife*, 91

6. A nuncupative will not made at the habitation of the deceased, nor where he had resided for ten days next preceding, but authenticated as the law requires, ought to be established, notwithstanding his being very unwell when he left home; if, afterwards, he was taken more dangerously ill, and died at the place where such will was made, *ib.*

7. Although in committing a nuncupative will to writing, within six days from the speaking of the testamentary words, a distinct and independent part thereof be omitted, the residue of the will is not thereby vitiated, *ib.*

8. A testator's bequeathing (among other things) an article of property which does not belong to him, is, at most, only a circumstance from which to infer a state of mind unfavourable to the making of a testament; and ought not to prevail against positive testimony, shewing his competency to make a will at the time in question, *ib.*

9. In construing a will the whole must be taken together, and no particular clause or clauses selected. *Reno's Ex'rs* v. *Davis and Wife*, 288

10. The word *increase* (without the word *future* prefixed) in the bequest of a female slave is ambiguous: and if the intention of the testator in using it, cannot be ascertained from the whole will taken together, parol evidence is admissible to explain it, *ib.*

11. Construction of a will. What words give a vested interest which will pass to the representatives of a deceased legatee, though he was not to enjoy the estate till the death of a particular tenant for life, and died before that event happened. *Taylor's Adm'x* v. *Taylor's Ex'rs*, 411

12. Where a will directs the sale and conveyance of land by executors, in general terms, a conveyance by two out of three executors, all of whom qualified and are living, is not valid in law, and cannot be aided in equity. *M'Rae* v. *Farrow*, 444

WITNESSES.

1. If a defendant at law be ruled into a trial in the absence of some of his witnesses, to whose materiality he has made affidavit, he may except to the opinion of the court, and proceed to obtain relief in a superior court of common law, but not in chancery. *Syme and others* v. *Montague*, 180

2. All deeds of trust and mortgages must be proved by three witnesses, or acknowledged by the party, and recorded within eight months, or they will be void as to creditors and subsequent purchasers, and they are only valid as to such, from the time they are fully executed. *Jennings & Robinson* v. *The Attorney-General*, 424

3. A verdict obtained at law, on the testimony of a single witness, whose answer (when he is brought into equity on the ground of his being a partner) is clearly contradicted, should be set aside, and a new trial directed. *Verdier* v. *Hume & Hume*, 479

4. A commission to examine one of the defendants as a witness should be awarded on the motion of the plaintiff in chancery, as a matter of course, saving all just exceptions. *Plainville* v. *Brown and others*, 482

5. A commission cannot issue at the instance of the defendant to examine the plaintiff as a witness in the cause. *Ross* v. *Carter*, 488

WRITS.

A writ returnable to a district court of common law, might legally be executed at any time during the term to which it was returnable. *Dunbar & Vass* v. *Long's Adm'r*, 212

END OF THE FOURTH VOLUME.